

OPINIONS

OF THE
CORPORATION COUNSEL
and ASSISTANTS

JANUARY 1, 1961 to JUNE 30, 1967

Compiled and Edited under the Supervision of

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CITY OF CHICAGO
DEPARTMENT OF LAW

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PREFACE

This book of opinions reflects the outstanding dedication and service of the lawyers who have served in the office of the Corporation Counsel for the past seven years. Credit for this volume goes, of course, to this fine staff of municipal lawyers whose energy, ingenuity, research and legal ability is embodied in these opinions. The opinions themselves give eloquent testimony not only to the wide range of legal problems presented to the Department but to the high professional caliber of the assistants. For their dedication and efforts in advancing, advocating and clarifying the legal position of the City of Chicago, I express my deepest gratitude.

If a book of opinions can be dedicated to an individual, then I dedicate this book to John C. Melaniphy, a brilliant municipal lawyer, a daring advocate, a tireless workman, a man who not only practiced to the fullest, but who taught many young lawyers the ways of careful research and painstaking preparation. For over twenty years Judge Melaniphy served the Department of Law; for ten of these years as Corporation Counsel. His contribution to the City of Chicago cannot be measured alone in terms of the effectiveness of his performance as head of the Law Department, though, in this regard, it was truly outstanding. Judge Melaniphy's greatest contribution involved his role as a counselor and confidant of the Chief Executive of this great City, wherein his resourcefulness and his creativeness exalted the true function of the law which is to make the law serve the needs of the people. In this sphere his greatness will most be remembered. In tribute to the people's lawyer par excellence, this volume is dedicated to Judge John C. Melaniphy, along with the wishes of every member of the staff that he enjoy a long and distinguished judicial career.

RAYMOND F. SIMON,
Corporation Counsel.

June 30, 1967.

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EXPLANATORY NOTES

SCOPE OF THIS VOLUME

The opinions in this Volume cover the period beginning with January 1, 1961, and ending with June 30, 1967. However, the opinions in this Volume are not all of the opinions issued by the Department of Law during that period of time. To include every opinion issued by the Department of Law would make this work unduly repetitious and would increase its bulk without any increase in its value as a reference tool. Therefore, only those opinions deemed to be of general significance were included in this Volume.

However, we hasten to advise City Officials that an expression of legal opinion issued by this office is still a binding opinion for their guidance regardless of the fact that it may not appear in this Volume.

NEW FEATURES

To make this Volume a more valuable research tool, two new cross-reference tables have been included. The first cross-reference table enables the reader to locate any letter of opinion in this Volume which directly cites and interprets a provision of the Chicago Municipal Code. The second table permits the reader to locate those opinions in this Volume which directly interpret any provision of the Illinois Municipal Code (Ill. Rev. Stat., Ch. 24). Both tables are located in this Volume immediately following the index.

In addition, it should be noted that the index to this Volume is cumulative and covers both the contents of this Volume and the contents of Volume 24. For the researcher's convenience the references to Volume 25 are set in bold face type.

DATA GIVEN WITH OPINIONS

Above each opinion in this Volume there is printed the name of the office or officer to whom the opinion was written, the initials of the author of the opinion, and the date of the opinion. Occasionally a letter of opinion is addressed to a private party having official business with the City. In such cases, the addressee of the opinion is designated by a descriptive term or by his initials.

Experience has indicated that the system of numbering opinions employed in former volumes of this series no longer serves any useful purpose. Therefore, the opinions in this Volume have not been numbered.

OPINIONS
OF THE
CORPORATION COUNSEL
and ASSISTANTS

CHAPTER I—POWERS AND DUTIES OF CITY COUNCIL AND CITY OFFICERS

Section A. CITY COUNCIL

INTERPRETATION OF AMENDMENT TO ORDINANCE

(Alderman—E. W. P.—January 10, 1961)

We have before us your letter of January 5, 1961, relative to Amendment No. 6422, a Planned Development in the area generally bounded by W. Estes Ave., N. Sacramento Blvd., W. Pratt Blvd., and N. Kedzie Ave. Your letter requests our opinion as to the legality of the ordinance, which has the following historical background:

Amendment No. 6422.

Introduced in City Council: May 27, 1960.

Recommendation submitted to Council Committee by Commissioner Bach: June 23, 1960.

Heard at public hearing before the Council Committee on Buildings & Zoning: June 23, 1960.

Recommended to the City Council by Council Committee: June 24, 1960. (Defer & Publish.) (City Council meeting.)

Meeting held in Mayor's Office with Commissioner Bach, Alderman Sperling and Community representatives: July 5, 1960.

Request by Commissioner Bach to Alderman Pacini for the City Council to defer any further action pending completion of Mayor's assignment to re-view findings and recommendation of proposed amendment: July 7, 1960. (City Council meeting.)

Report submitted to Mayor by Commissioner Bach—confirming original recommendation: November 28, 1960.

Report submitted to Department of City Planning by the Consultant hired by the Community groups: December 14, 1960.

Final City Council action: December 30, 1960. (Pass)

Section 11.4-1, subsections 1A through c. of the Ordinance, with reference to Planned Developments, reads as follows:

- (1a) Planned Developments as hereinbefore defined are of *such substantially different character from other amendments that qualifications are hereby set out to govern the recommendations of the Commissioner of City Planning and the action of the City Council.* (Italics supplied.)
- (1.) In the case of planned developments the Commissioner of City Planning may recommend and the City Council may authorize by proper amendments that there be a variety of districts in the area of such development, provided the Commissioner of City Planning shall find:

- a. That the districts permitted shall be for the purpose of developing an integrated site plan.
- b. That the districts permitted by such amendment are necessary or desirable and are appropriate with respect to the primary purpose of the development.
- c. That the districts permitted are not of such a nature or so located as to exercise a detrimental influence on the surrounding neighborhood.

The Section that you quote in your letter, 11.9-7, is contained within the regulations generally on amendments commencing with Section 11.9-1 through 11.9-8 and reads, as you quoted it, as follows:

"If an application for a proposed amendment is not acted upon finally by the City Council within six (6) months of the day upon which said application is filed by the City Clerk with the City Council it shall be deemed to have been denied."

However, even though it were conceded that a proposed amendment for Planned Development, which the ordinance says is of such substantially different character from other amendments that special qualifications are set out to govern the recommendations of the Commissioner of City Planning and the action of the City Council is construed to be guided by the language of Section 11.9-7, it is our opinion that the words "it shall be deemed to have been denied" refers to a disputable, rebuttable presumption and was largely enacted by the City Council for the purpose of fixing the time in which the applicant could consider that his application was denied so that he would not be deprived indefinitely of his right to proceed with an action for declaratory judgment or other appropriate action to obtain the relief he seeks. *Kleppe v. Odin Twp. McHenry County, et al.*, 169 N. W. Rptr., 313.

Our reasoning is based upon the fundamental rule in the interpretation of statutes and ordinances to construe them according to the sense of the terms and intention of the legislative body. It is said that whenever the meaning of a word used in a statute or ordinance becomes a subject of controversy in a legal proceeding, the ascertainment of its strict primary signification is not so much a matter of importance as the sense in which it was used by the legislative body, and that the latter must control even though the word has been used without regard to its appropriate and primary meaning, where such intention appears from the act or ordinance. This is the rule. *City of Springfield v. Green*, 120 Ill. 269. *Standard Oil Co. v. Kamradt*, 319 Ill. 51. Statutes are to be interpreted according to their intent and meaning. *Condon v. City of Chicago*, 249 Ill. 596; *Canal Commissioners v. Sanitary District*, 184 Ill. 597. *Fenske Bros. v. Upholsterers Union*, 358 Ill. 239, at page 246.

It is further our opinion that in the present instance the presumption raised by the Section is clearly rebutted and overcome by the facts disclosed in the record which prove conclusively the favorable action on the amendment of the City Planning Commission, the favorable action of the Committee on Building and Zoning with its recommendation to the Council, and the favorable action of the Council itself in its vote to defer and publish on June 24, 1960, all well within the six months period. The ordinance would have passed finally on July 7, 1960, except for the postponement of this final passage which was granted at your request in the meeting held in the office of the Mayor with Commissioner Bach, yourself, and the Community representatives. It was not until December 14, 1960 that a report dated December 6, 1960 from the Community groups through their expert Consultant, was submitted to the Department of City Planning, with which report the Department disagreed, and the amendment was finally passed on December 30, 1960. Any delay in the passage of the ordinance was occasioned at your request after the public hearing.

It is our opinion that the amendment for the Planned Development complies with the law and that the Council procedure has been in accordance with the law. With reference to your observation in your letter that the proposed Planned Development was amended on its face by the Chairman, the record shows that the amendment as passed was the identical amendment as initially submitted, which you can easily verify.

“OPEN OCCUPANCY” LEGISLATION

(Mayor and Member of City Council—J. C. M.—March 22, 1961)

On November 25, 1960 a Resolution was passed by the City Council to have determined by the Corporation Counsel whether the City has the power under the law to legislate an “open occupancy” of housing accommodations and the sale and purchase thereof.

Cities in Illinois are not autonomous governmental bodies. They have no home rule powers. The powers of the City are derived from statutory provisions which must be specific or necessarily incident to the powers expressly granted. The courts of Illinois are unanimous in their repeated assertion that municipal corporations have no inherent powers. There is no express power to regulate or control the right of contract for use of private property for lawful purposes.

The power given cities with reference to promotion of health is found in Section 23-81 of the Revised Cities and Villages Act (Illinois Revised Statutes—1959). It gives the City power to do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease. The City's police power is given by the same statute under Section 23-105 and empowers the city to pass and enforce all necessary police ordinances. In the case of *Ambassador East, Inc. v. City of Chicago*, 399 Ill. 359-366 the Supreme Court had these statutory provisions before it in connection with an ordinance passed by the City of Chicago relating to rent control in housing accommodations, including hotel rooms. The ordinance in question was a penalty ordinance. The trial court struck down the ordinance and the Supreme Court affirmed the Circuit Court in holding that the municipality had no authority to pass the ordinance. The City argued in that case that under the powers granted in Sections 23-81 and 23-105 increases in rent would force out of such accommodations those who could not afford to pay increased rents; that every person forced to vacate a dwelling in a hotel must seek another person not so well situated financially; that a vicious circle is set up which results in overcrowding or ousting of tenants until at the bottom of the pyramid persons are forced out onto the streets or into already desperately overcrowded accommodations with the resultant increase in disease, delinquency and immorality.

The Supreme Court said it could not construe the statutory provisions referred to as authorizing or empowering the city to regulate charges for hotel housing accommodations and that the ordinance in question had no basis of support in either the health or police power provisions of the statutes. The court further held “cities in this state have no inherent powers but only such as are delegated to them and such as are necessarily incident to those granted, and a delegation of power will be strictly construed.”

In New York City an ordinance was passed in relation to discrimination and segregation in multiple dwellings. This ordinance was not a penalty ordinance and under its charter New York City had home rule which does not exist in municipalities of Illinois. In New York the ordinance was subject to enforcement by a Fair Housing Practice Board and it provides that if the board should find the evidence of such discrimination it may direct the Corporation Counsel to bring equitable proceedings in the name of the city for the enforcement of the law and not by criminal proceedings, presumably by injunction.

It will be noted that the legislature (Section 23-103.1) has provided a specific remedy "where buildings, by reason of delapidation, overcrowding, faulty arrangement or design, lack of ventilation, light or water facilities, or any combination of these factors are a detriment to public safety, health, or morals," which is the removal or demolition of such buildings or rehabilitation of the property.

Since the legislature has not given to the municipalities in Illinois the specific power to legislate on the relations of landlord and tenant or seller and buyer of housing accommodations, the city does not have the power to legislate as to the private rights of the landlord or owner of housing accommodations imposing upon them conditions in the management and operation or the sale of such accommodations.

AUTHORITY OVER JURY FEES

(Chairman, Subcommittee, Finance—A. F. G.—April 7, 1961)

Your letter of March 30, 1961 is as follows :

"At the direction of the Chairman of the Finance Committee, I request your opinion as to the constitutionality of a proposed ordinance to amend Section 197 A-1 of the Municipal Code of Chicago relating to charges in connection with jury demands. A copy of the proposed ordinance is enclosed.

Does the insertion of paragraph 4 providing for the refund of a portion of the fee raise any constitutional problems. Would the amendments of paragraphs 1, 2 and the first part of paragraph 3 of Section 9th be constitutional without the insertion of paragraph 4. Does the insertion of paragraph 4 invalidate the proposed ordinance. In other words, can we raise the jury fees as proposed? Then, can we provide for the refund as contemplated by the enclosed proposal."

Prior to 1931, Section 56 of the Municipal Court Act definitely fixed the fees of the clerk of the Municipal Court in connection with civil suits instituted in that court. In 1931 that section was amended permitting the city council of the City of Chicago, by a two thirds vote of its members, upon the recommendation of two thirds of the judges of the Municipal Court, by ordinance or ordinances, to make such changes in or additions to the provisions of such section with respect to costs as *may be deemed expedient*. The constitutionality of the amendment which delegated legislative authority to the city council of Chicago to fix fees in civil cases, was upheld by our Supreme Court in *The People v. Gill*, 358 Ill. 261 (1934).

In this case the relator urged that numerous provisions of the constitution were violated by the amendment. The court, in a clear and lengthy opinion, decided that none of the sections of the constitution cited by the relator were violated. We have not quoted from this opinion because of its length, but suggest that you read this case, and believe that you will be convinced as we were with the soundness of its reasoning and the conclusions reached.

The above quoted decision having established the validity of the delegation of power by the General Assembly to the city council to fix jury fees and costs "as may be deemed expedient", it is our opinion that any ordinance relating thereto, unless patently disproportionate to the expenses involved, would be a valid exercise of the city's power, and the fact that such provisions include a provision for refund of fees or portion of fees under circumstances where cases are settled without the necessity of service of a jury, would tend to substantiate the reasonableness of the fees as an incident to the imposition thereof.

It is our opinion that the ordinance is free of constitutional objections.

PUBLIC ATTENDANCE AT COUNCIL MEETINGS

(Alderman, 18th Ward—A. G. P.—August 29, 1961)

Your letter of August 7, 1961, addressed to Mayor Daley, is as follows:

"The actions of some of the members of the public that have attended the City Council meetings in recent months has me concerned about the question as to whether or not the rules of the City Council with respect to the admittance of the public ought not to be strengthened to prevent disorder and for the safety of the members of the Council, employees and yourself, as presiding officer of the Council.

The laundermat meeting of the City Council has convinced me that some action ought to be taken in this regard before any such occurrence as that which arose when the laundermat ordinance was debated occurs again. From a number of recent meetings of the City Council at which controversial ordinances were being debated and considered, it appears that some members of the public are under the impression that the way to move a legislative body is to pack the galleries and boo and hiss members of the Council. In my opinion, such action prevents the legislative body from properly conducting its business and in view of the televising of such occurrences, it results in the public obtaining a poor picture of the municipal legislative body.

House of Representatives in Washington formerly admitted members of the public into its meetings indiscriminately. Such action resulted in some of the members of Congress being seriously injured by spectators. As a result Congress enacted rules that every visitor of the House of Representatives must obtain a pass to the gallery of the House of Representatives from some member of Congress. It is my opinion that such a rule could be enacted for the City Council which would retain the public character of its meetings and at the same time prevent the disorders which have recently occurred in the gallery of the City Council.

I would like to prepare such a rule for consideration by the City Council, but would like to have your views concerning the same before doing so."

As requested we have prepared for your consideration the following rule:

Admission to Public Galleries.

Rule 56. The public is free to attend the meetings of the City Council, but admission of visitors to the public galleries shall be by passes issued by the Mayor or by members of the City Council. This requirement shall not apply to school children accompanied by their teachers. Visitors so admitted shall conduct themselves in an orderly manner, and any loud or boisterous conduct which interferes with the orderly conduct of the council, shall result in the expulsion of the offenders. If the individuals responsible for the disorder cannot be located the mayor after a warning, may order the galleries cleared.

If you have a copy of the congressional rule referred to in your letter, we suggest you compare it with the foregoing draft.

POWER TO MAKE ZONING CHANGES

(Zoning Administrator—A. H. & S. R. D.—February 2, 1962)

Your letter of December 13, 1962, requests an opinion with regard to the power of the City Council to consider zoning changes in areas which have been:

1. "merely designated as an urban renewal area—prior to approval by the Community Conservation Board or the Land Clearance Commission;" and
2. "designated as an urban renewal area for which an urban renewal plan has been approved by the City Council—prior to approval by the Community Conservation Board or the Land Clearance Commission."

You have also requested an opinion regarding the applicability of the foregoing with "reference to jurisdiction when a suit for declaratory judgment is filed in the courts."

The Urban Renewal Consolidation Act of 1961 (Ill. Rev. Stat., chap. 67½, pars. 91.101-91.136) pertains to Slum and Blighted Areas and Conservation Areas. The Community Conservation Board and the Land Clearance Commission, mentioned in your letter, have now been consolidated into the Department of Urban Renewal (Section 2), which name we will hereinafter use.

Under the Slum and Blighted Areas provisions of the Act, the Department of Urban Renewal is given the power to designate a particular slum or blighted area (Section 9), which designation shall be effective after approval by the City Council (Section 11). It is also given the power to purchase land (Section 12), to clear the same by demolition or removal of existing buildings and structures thereon (Section 13), and to convey the real property so acquired (Sections 17, 18) for use in accordance with a redevelopment plan, which plan must also be approved by the City Council (Section 19).

On the other hand, in conservation areas the Act does not contemplate as its primary purpose the demolition or removal of buildings in the area. Rather, the Department has the duty to conserve and upgrade the area. Therefore, the City Council does not affirm the Department's designation of a conservation area, but approves the completed plan (Section 21).

In light of the foregoing, the answer to your first question is that the City Council can consider zoning changes in a designated slum and blighted area or a conservation area prior to the approval of the plan for development or conservation by the Department of Urban Renewal.

Your second question is difficult to answer because a Slum and Blighted Area Plan (Section 19) and a Conservation Area Plan (Section 21) must be approved by the Department of Urban Renewal before it is submitted for approval by the City Council. Therefore, under the Act, there could be no situation wherein the City Council approved a plan prior to its being approved by the Department of Urban Renewal. If your question is limited only to a slum and blighted area, however, where the City Council has approved a designation of the area (Section 11) but not the plan (Section 19), then the City Council would have the power to consider zoning changes in the area.

With respect to the third and final question to which your letter refers, there is a case presently on appeal before the Supreme Court of Illinois, *Westfield v. City of Chicago*, Docket No. 36857, in which the City contends that the Courts are without authority to declare invalid the zoning provisions contained within a Conservation Plan which has been approved by the City Council, unless the entire plan is attacked as being arbitrary and capricious. The appeal is not as yet at issue and a determination thereof will not be forthcoming for several months.

JURISDICTION OVER URBAN RENEWAL

(Zoning Administrator—A. H. & S. R. D.—February 2, 1962)

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AUTHORITY TO PASS EQUAL EMPLOYMENT ORDINANCE

(Chairman, Committee on Health—J. G. O.—March 22, 1962)

We have reviewed your letter with the attached copy of the proposed amendment to the Municipal Code of Chicago, pending before the Committee on Public Health, to prohibit discrimination in the employment of physicians or in the appointment of any person to medical staffs of hospitals.

You ask that we render an opinion as to whether the City Council has the legal right to pass such an ordinance.

Chapter 38, Section 125, Illinois Revised Statutes 1961, reads as follows:

"125. All persons entitled to equal enjoyment of accommodations—Discrimination in price on account of race or color prohibited.) Section 1. All persons within the jurisdiction of said State of Illinois shall be entitled to the full and equal enjoyment of the accommodation, advantages, facilities and privileges of inns, restaurants, eating houses, hotels, soda fountains, soft drink parlors, taverns, roadhouses, barber shops, department stores, clothing stores, hat stores, shoe stores, bath-rooms, restrooms, theaters, skating rinks, public golf courses, public golf driving ranges, concerts, cafes, bicycle rinks, elevators, ice cream parlors or rooms, railroads, omnibuses, busses, stages, aeroplanes, street cars, boats, funeral hearses, crematories and public conveyances on land, water or air, and all other places of public accommodations and amusement, subject only to the conditions and limitations established by laws and applicable alike to all citizens; nor shall there be any discrimination on account of race or color in the price to be charged and paid for lots or graves in any cemetery or place for burying the dead."

Section 1 of Chapter 199a of the Municipal Code is the same as Section 125 of Chapter 38 of the Illinois Revised Statutes 1961, and although hospitals are not specifically mentioned therein, it is our opinion that hospitals are places of public accommodation as recognized by the Legislature and in Chapter 120. Section 500.7 of the Illinois Revised Statutes 1961 which reads, in part, as follows:

"No hospital, however, which has been adjudicated by a court of competent jurisdiction to have denied admission to any person because of race, color or creed, shall be exempt from taxation."

The State of Illinois has expressed a declaration of policy in the "Fair Employment Practices Act", Chapter 48, Section 851, which reads, in part, as follows:

"Therefore it is declared to be the public policy of this State that without in any way precluding any employer from selecting between persons of equal merit, ability, and capabilities, equal employment opportunity or apprenticeship opportunity without discrimination because of race, color, religion, national origin or ancestry should be protected by State law."

It is our opinion, therefore, that the Council has legal authority to pass the proposed ordinance now pending before your Committee on Health.

CITY COUNCIL AS A CONTINUOUS BODY

(Chairman, Finance Committee—J. C. M.—March 4, 1963)

The question of whether or not the City Council of the City of Chicago is a continuous body has been posed to me orally, as it is felt that the question may come up before the City Council on March 6, which is the last council day for the present elected aldermen.

The majority opinions of the courts and text writers have concluded:

"A municipal corporation is never without its governing body; and this body when duly organized is a continuous body, and its power is a continuing power. In legal contemplation it remains the same council regardless of changes in its personnel, whether the changes are caused by reason of the expiration of the terms of its members, or because of vacancies occasioned by death, removal, or other causes. * * * the old council remains in existence and the members thereof remain in office until the new council has come into being and is qualified to act." 62 C. J. S. § 386, page 730.

In *Ackerman v. Baird*, N. M. 76 P. 2d 947, at page 951, the principle above stated is concurred in.

Also, *Van Cleve v. Wallace*, Minn. 13 N. W. 2d 467, at page 472, where it is stated:

"A municipal council is not, like the legislature of a state, a body which exists only during the term for which its members are elected, and which is created anew at each election, but is a continuous body although its membership may be changed every year, or at some other period. As a result of this principle, business begun in a municipal council may be completed after its members have gone out of office and a new council has been elected." * * * "It has been held that the expiration of the terms of all members at the same time does not prevent the council from being a continuous body. A new council may take up proceedings where they were left by the old council."

Of like holding is the decision rendered in *Denio v. City of Huntington Beach*, Cal. 140 P. 2d 392, at page 397.

In Chapter 24, Section 21-22 of the Illinois Municipal Code it is provided:

"The aldermen so elected to hold for a term of four years and until their successors are elected and qualified."

It is our opinion that the majority rule is sound and that the City Council of the City of Chicago is a continuing body.

CALL FOR SPECIAL MEETING

(City Clerk—J. C. M.—January 16, 1964)

You advise that on January 15, 1964, a purported call for a special meeting of the City Council signed by three aldermen was deposited with you. That document reads as follows:

"To John Marcin as City Clerk of Chicago:

Whereas:

By ordinance of this City Council, a special aldermanic election will be held in the First Ward on January 21, 1964. During previous aldermanic elections, the Department of Police has assigned a police officer to each polling place in the ward during the election and the count. Despite long experience, the Superintendent of Police has declined to make such an assignment for January 21. An emergency has arisen which threatens democratic processes in Chicago. Therefore:

We the undersigned, aldermen of the City of Chicago do hereby call a special emergency meeting of the City Council of Chicago for Saturday, January 18, 1964, at 10:00 A. M. in the City Council Chambers, City Hall, Chicago, for the purpose of passing such ordinances, orders, resolutions, and other measures and taking such action as may be necessary to assure the presence of police officers, guardians of the peace, deputies, city employees, county employees, volunteers, or other persons at the First Ward polling places on January 21, 1964, in order to assure order, lawfulness, peacefulness, and the free and fair exercise of the right to vote.

Chicago, January 15, 1964."

You request an opinion as to whether this purported call for a special meeting and the purposes mentioned therein is legal.

The jurisdiction of the special election, not only in the 1st Ward as mentioned in the purported notice, but in the 11th and 24th Wards come under the jurisdiction of the Board of Election Commissioners who are under the jurisdiction of the Circuit Court of Cook County. Chapter 46, Section 18-7 reads as follows:

"Said judges of election shall have authority and it shall be their duty to keep the peace, and to cause any person to be arrested for any breach of the peace or for any breach of election laws, or any interference with the progress of registration, revision, election or of the canvass of the ballots; and it shall be the duty of all officers of the law present to obey the order of such judges of election, or either of them, and an officer making an arrest, by direction of any judge, shall be protected in making such arrest the same as if a warrant had been issued to him to make such arrest."

We stated in Volume 10, Opinions of the Corporation Counsel, March 28, 1919, page 803:

"It will be observed from the foregoing section that, during the entire period of time during which the judges of election are officially engaged in conducting an election, registration, revision, or of the canvass of the ballots, they have a right, and it is their duty to require police officers to arrest any person obstructing their work or in any manner violating the law, and it is quite clear to us that the law contemplates that police officers will be on hand during the entire time that

an election, registration, revision or canvass of the ballots is being conducted for the purpose of aiding the judges of election in preserving law and order."

In Volume 10 of the Opinions of the Corporation Counsel at Page 552 we stated that the Board of Election Commissioners of the City of Chicago has complete and full control and management of the office of the election commissioners of the City of Chicago and the employees thereof.

"This board has been created by an act of the General Assembly of the State of Illinois, and under the act the commissioners are appointed by the judge of the County Court of Cook County."

In the case of *Wetherell v. Devine*, 116 Ill., p. 631, the Supreme Court held the Board of Election Commissioners created by the law of 1885 are corporate authorities within the meaning of the Constitution.

If there is any doubt in the minds of the aldermen who signed the purported call for a special meeting as to the matter of protection other than that provided by law, they should present the matter to the Circuit Court of Cook County, which has jurisdiction over the Board of Election Commissioners of the City of Chicago.

We are advised that the Superintendent of Police has decided to assign police officers to the polling places in the three wards where special elections are to be held. This is a duty under the law as this office has determined in the opinions cited above. From an examination of the law and the proposed purposes set forth in the call for a special meeting of the City Council, it is quite apparent that no ordinance that could be passed by the City Council at such a special meeting would have any legal effect or have any binding effect upon the Circuit Court of Cook County, the Board of Election Commissioners of the City of Chicago or the Superintendent of Police. Therefore, the purported call for a special meeting does not contain a legal purpose.

It is our opinion, therefore, that you should ignore the call for a special meeting of the City Council to be held on January 18, 1964.

AUTHORITY OVER PRIVATE WELFARE FUND

(Budget Director—S. R. D.—January 26, 1965)

We acknowledge receipt of your letter of January 18, 1965, together with a Memorandum of Agreement between the Associated Steel Erectors, referred to as Employer, and Local No. One, International Association of Bridge Structural and Ornamental Iron Workers, referred to as Union, dated May 26, 1964. The Agreement contains the following provision:

* The employers agree to deduct 10¢ per hour from the employees scale and deposit same in a bank designated by the union. The amount deducted will be clearly shown on the pay stub of the employee. In the event of Overtime the amount deducted will be double.

* Same as above but .20¢ per hour."

Also attached is a form letter from the Executive Board of Local No. One of the Bridge and Structural Iron Workers, dated August 27, 1964, signed by Steve Zakula, Chairman, to the Employers, which explains the procedure to be followed in "checking off" from the employees wages the amount due for the Vacation Plan and transmitting same, with the union dues, to the Amalgamated Trust and Savings Bank.

"Sept. 1, 1964

"Sept. 1, 1965

On Monday, January 25, 1965, you informed the undersigned that the City has not entered into an agreement of any kind with the Union and does not now "check off" the union dues. You also state that the Union is demanding an additional 10 cents per hour because of the vacation plan provision as hereinbefore set forth.

It is fundamental that a city employee shall not be paid a salary in excess of the amount contained in the annual appropriation ordinance. The 1965 Appropriation Ordinance provides as follows (C. J. 12-3-64, p. 3918) :

<u>"Code</u>	<u>Position</u>	<u>No.</u>	<u>Rate</u>
	* * *		
4838	General foreman of Bridge & Structural Iron Workers	1	5.60h
4836	Foreman Bridge & Structural Iron Workers	2	5.47½h
4834	Bridge & Structural Iron Workers (sub-foreman)	20	5.47h
4834	Bridge & Structural Iron Workers	100	5.10h
	* * *		

The foregoing are the amounts appropriated in the 1965 Appropriation Ordinance for bridge and structural iron workers foremen and employees. These employees cannot be paid a sum greater than the hourly rate therein provided.

This conclusion is in accord with the opinion of this office, dated September 1, 1950, where it was held (Opinions of the Corporation Counsel, Vol. 23, pp. 189-191) :

"The City Council has no authority to appropriate any sum as a contribution to a private welfare fund established by the unions by agreement with certain contractors associations.

"Our Supreme Court has repeatedly held that a municipal corporation in this State has no power in the absence of express authority to donate or loan money to private enterprises. (*Bissel v. City of Kankakee*, 64 Illinois 249; *Mather v. City of Ottawa*, 144 Illinois 659; *City of Fulton v. Northern Illinois College*, 158 Illinois 333; *Washingtonian Home v. City of Chicago*, 157 Illinois 414.)"

It is our opinion that the City should not pay to the bridge and structural iron workers employed by the City of Chicago an additional 10 cents per hour for the Union's Vacation Plan Fund.

We are returning the Memorandum of Agreement dated May 26, 1964 and the form letter from the Executive Board of Local No. One of the Bridge and Structural Iron Workers, dated August 27, 1964.

APPROVAL FOR AIRPORT SUB-LEASE

(Commissioner of Aviation—R. F. S.—August 2, 1965)

This department is in receipt of letters from Trans World Airlines, Inc., Pan American World Airways and your department relating to assignment or permitted use of space by Pan American in Cargo Building No. 2 at O'Hare Airport, presently held under lease by TWA.

While there is no way in which the Law Department can authorize a sublease by TWA to Pan American, the factors which you describe in your letters and phone conversations and the urgency of providing space to Pan American to obviate the use of trailers, etc. would indicate that an interim solution is called for. If it is clearly understood that Pan American will vacate the premises immediately, if it is the decision of the City Council to

refuse the sublease, if they will pay the rental which is agreed upon by the City Council retroactively to the date of occupancy and if they will proceed through the Department of Aviation to acquire a lease from the city, it would appear to this department to be a reasonable interim solution to this problem.

I am, therefore, of the opinion that while I must inform you that only the City Council has the legal authority to authorize a sublease of space, if in the administration of O'Hare Field, it is your opinion that the allocation of space must be made prior to obtaining approval from the City Council, in order to carry on the efficient operation of the Field, there would be no objection from this department to a temporary solution of the problem in this manner.

APPROVAL FOR TOLL INCREASE

(City Comptroller—S. R. D.—December 8, 1966)

We acknowledge receipt of your letter of December 6, 1966, requesting our opinion as to "whether an increase in toll rates must be approved by City Council before it becomes effective".

Section 10-702 of the Act concerning Bridges, Ferries, Terminals and Other Highway Structures (Ill. Rev. Stat. 1965, chap. 121, par. 10-702), which grants to a municipality the power to acquire and maintain a toll bridge, provides that every municipality shall have the power:

"(3) To fix, alter, charge, collect, segregate, and apply tolls and other charges for transit over and use of such a bridge or bridges;"
Section 10-704 of said Act provides in part as follows:

"An ordinance authorizing bonds under this Division of this Article may contain provisions, which shall be part of the contract with the holders of the bonds, as to * * * (2) the rates of tolls and other charges to be charged by the municipality for transit over or use of the bridge, and their segregation and application, * * *."

Section 10-705 of the Act provides in part as follows:

"The municipality shall fix rates of toll to be charged for transit over and use of such a bridge. * * *"

Section 10-705 also provides that the rates of toll shall be sufficient to pay the reasonable cost of maintaining, operating, and repairing the bridge; to provide a sinking fund to pay for the bonds, to pay for all bonds redeemed or purchased before maturity; to fulfill the terms and provisions of any agreement with holders of the bond; and to provide a sinking fund of accumulated tolls and revenue in such amount that the annual interest therefrom will provide adequate income to pay the cost of operating, improving and repairing the bridge.

From the foregoing it is apparent that the rate of toll for the Chicago Calumet Skyway Toll Bridge is a "part of the contract with the holders of the bonds" and, therefore, should be fixed by ordinance.

The ordinance providing for the erection and maintenance of the Chicago Calumet Skyway Toll Bridge and the bonds to be issued therefor contemplated that the tolls for the use of the bridge shall be fixed by ordinance. Section 5.01 of Article V of the Chicago Skyway Toll Bridge Ordinance (C. J. 12/9/54, p. S745) provides in part as follows:

"The City covenants that prior to the opening of the Bridge for traffic it will fix and place in effect an initial schedule of tolls and that the rates of tolls in such initial schedule will not be changed without the approval of the Consulting Engineers * * *."

Section 5.01 also provides that the City will request the Consulting Engineers to revise the schedule and rates of tolls "as may be necessary or proper, in order that the revenue of the bridges will be sufficient at all times to meet" the expenses and sinking fund requirements as provided in said ordinance.

It is our opinion that when the ordinance speaks of "City" it refers to the corporate authorities which, by statute, is defined as the City Council (Ill. Rev. Stat. 1965, chap. 24, par. 1-1-2).

In light of the foregoing, it is our opinion that the City Council must approve an increase in toll rates before they could become effective.

AUTHORITY OVER SKYWAY PROPERTY

(Commissioner of Streets and Sanitation—R. L. C.—December 16, 1966)

Your letter of December 9, 1966 informs us that the Finance Committee of the City Council has authorized the construction under a lease agreement of a restaurant and service station complex in the vicinity of 88th and Kingston on the Chicago Skyway.

The property in question is a grassy, median area adjacent to the existing Toll Plaza. Other than the aesthetic values of such an area, it presently serves no useful purpose nor does it in any way compliment the revenue-producing right of way of the Skyway. In its present status the area is maintained by Skyway employees and thereby contributes to the expense of operating the Facility without returning any financial benefit whatsoever.

Utilization of this area by the restaurant-service station complex will provide a revenue-producing Facility, and additional service and convenience to Skyway users, and a potential stimulant to additional user revenue. The leases provided that the complex will be built and maintained by the Lessor.

Section 7.01 of the Skyway ordinance (Council Journal p. 8749, December 9, 1954) provides: "The City covenants that . . . the bridge will be economically and efficiently operated on the basis of sound business principles . . ." The construction of a revenue-producing trade stimulating Facility in an area now serving no useful or valuable purpose is in keeping with the City's obligation that the bridge be "economically and efficiently operated on the basis of sound business principles".

Section 7.02 of the Skyway ordinance (Council Journal, p. 8749, December 9, 1954) provides: "The City covenants . . . that the operating efficiency shall be of the highest character . . . and that the City use its best efforts to see to it that the cost of such operation and maintenance shall at no time be in excess of Revenues reasonable available for such purposes so long as any of the bonds remain outstanding". The leases for the complex are an expression of the City's determination to "use its best efforts" to realize all "revenue reasonably available" in the operation of such a Facility.

Section 7.05 of the Skyway ordinance (Council Journal, p. 8750, December 9, 1954) provides: "The City shall have the right to sell or otherwise dispose of any property, real or personal no longer necessary, appropriate or required for the use of, profitable to, or for the best interest of the City operation of said bridge as provided by law". It is obvious that the subject area in its present state is neither "necessary, appropriate or required" and that the "best interest of the City operation of said bridge" is served by converting the area to a revenue-producing Facility. Since the City has the right "to sell or otherwise dispose of any property", the leases in question are within the authority of the City Council to execute and are in keeping with our commitment to the bondholders.

AUTHORITY OVER ILLINOIS COMMERCE COMMISSION

*(Chairman, City Council Committee on Local Transportation—
M. M. M.—January 25, 1967)*

Your letter of December 1, 1966 addressed to Raymond F. Simon, Corporation Counsel, inquiring as to whether or not the City Ordinance, Chapter 193-7.10, is applicable to smoking on a Continental Air Transport Company bus, has been referred to the writer for reply.

Chapter 193-7.10 provides, in part, that: "it is unlawful for any person to smoke or carry a lighted cigarette, cigar or pipe in . . . public conveyances having a capacity of more than seven (7) passengers operating within the city limits of the city of Chicago."

This provision of the Municipal Code can only apply to such public conveyances as the city has jurisdiction over. The Continental Air Transport Company is a public utility and under the exclusive jurisdiction of the Illinois Commerce Commission. The Illinois Commerce Commission regulates public utilities under the Public Utilities Act, Illinois Revised Statutes, 1965, Chap. 111½. Section 49 of said Act grants the Commission the power to establish rules and regulations to be complied with by public utilities in order to insure the safe operation of their service.

We are, therefore, of the opinion that a regulation of the Illinois Commerce Commission would be necessary in order to prohibit smoking on buses operated by public utilities under the jurisdiction of the Illinois Commerce Commission.

CONSTITUTIONALITY OF FAIR HOUSING ORDINANCE

(City Council—S. R. D.—January 23, 1967)

On January 19, 1967, the Illinois Supreme Court rendered its opinion sustaining the constitutionality of the Chicago Fair Housing Ordinance (Municipal Code of Chicago, chap. 198.7B).

The ordinance adopted by the city council of Chicago on September 11, 1963 declares it unlawful for real-estate-brokers to discriminate on account of race, color, religion, national origin or ancestry in the sale, rental or financing of residential property in the city. The ordinance also declares, in substance, that it is unlawful for brokers to solicit sales of property from white persons on the ground that loss of value will ensue because Negroes have moved or are about to move into a neighborhood, a practice commonly referred to as "panic peddling." In this connection it prohibits the distribution by brokers of any written material or statements designed to induce the owner to sell or lease his property for such reasons.

The administrative machinery for enforcement of the ordinance empowers the Commission on Human Relations to initiate or receive complaints charging violations of the law, to investigate them, and to conduct conciliation hearings. If such conciliation fails, the commission shall, after notice to all parties, hold a hearing on the complaint, in which oaths are administered and testimony taken, and make a written report and recommendations which shall be served on the parties within a specified time. The commission is empowered to recommend to the mayor in this report the suspension or revocation of the broker's license issued by the city if he is found guilty of violating the ordinance. Any broker whose license has been suspended or revoked, or any complainant aggrieved by the decision has the right of appeal under the Administrative Review Act. The Mayor may also direct the corporation counsel to file with the Illinois Department of Registration and Education a complaint against any broker found violating the ordinance, seeking suspension or revocation of his State license.

The court stated that the issues presented for determination are: whether the municipality has authority under Illinois law to adopt such an ordinance; whether the ordinance violates the due-process and equal-protection clauses of the constitution of the United States and of the State of Illinois; whether the ordinance violates the constitutional guarantees of freedom of speech and freedom from unlawful or unreasonable search and seizure; and whether the enforcement procedure of the ordinance complies with the requirements for procedural due process.

The court, in sustaining the ordinance, held:

(1) The City of Chicago has the express delegated power to regulate brokers (Ill. Rev. Stat. 1965, chap. 24, par. 11-42-1).

(2) The express power "to regulate" a particular business has been held to include the power to enact police regulations for that business.

(3) In the instant case, from the evidence in the record it cannot be said that this antidiscrimination housing ordinance is not directed at, or fails to alleviate in some measure the social ills set forth in the record and recognized in the judicial decisions. In any event, there is no palpable abuse of power or of legislative discretion. The ordinance, therefore, cannot be deemed a denial of property without due process of law, even though it may interfere with the rights of plaintiffs to contract with persons of their choice.

(4) The limitation of the application of the ordinance to real estate brokers is not a denial of the equal protection of the law. The city council was not obliged to deal with the evil of housing discrimination in its entirety by prohibiting such conduct by all persons alike. Quite the contrary. Pursuant to a realistic appraisal that in this emotionally charged area of housing and race relations progress can be made by cautious advance, the city could direct its attention to the aspect of the problem it deemed most acute.

(5) Real-estate brokers engage in far more transactions of buying, selling, renting, and financing of property, and consequently have far more opportunity to exercise discrimination and affect the housing market than do individual property owners.

(6) The controversial provision of the Fair Housing Ordinance, attacked as a violation of freedom of speech guarantees, was designed to strike at the practice of "panic peddling," which is condemned by all parties to this litigation. That device, whereby owners are induced to part with their property by implanting or inflaming fears that property values will diminish because Negroes are, or may become residents, not only defames a group, but is a technique used by some real-estate brokers to perpetuate segregated housing. As such, it is a handmaiden of the other discriminatory practices declared unlawful in this ordinance, and it is not entitled to constitutional protection.

(7) Since the ordinance provides for all safeguards necessary for a fair administrative adjudication, the availability of the permissive preliminary conciliation procedure in no way impairs those safeguards or constitutes a denial of procedural due process of law.

The court summarized its opinion as follows:

"From the foregoing analysis we conclude that the city of Chicago had authority, under its expressly delegated power to regulate real-estate brokers, and the police power incidental thereto, to enact the Fair Housing Ordinance, which prohibited real-estate brokers from discrimination on grounds of race, color, religion or national origins in the sale, rental, or financing of housing. The ordinance was enacted in an effort to cope with the plethora of problems resulting from discrimination in housing. The imposition of the restrictions on real-estate brokers alone was reasonably related to the objectives of the law and was not arbitrary, in view of the fact that they affect the housing market to a far greater extent than do individual property owners. Consequently, this ordinance in no way infringed the constitutional guarantees of due process or equal protection of the law. Nor does it offend any other constitutional provision."

We are transmitting a copy of the Court's Opinion.

Section B. POLICE DEPARTMENT

POLICE MARINE JURISDICTION

(Chairman, Committee on Harbors, Wharves and Bridges—R. N.—
April 24, 1961)

Enclosed herewith is draft of a substitute ordinance to regulate the operation of motor boats along the shore of Lake Michigan. In our opinion, the draft submitted to us for consideration attempted to cover regulation broader than may be covered under Chicago's delegated authority.

Section 23-48 of the Revised Cities and Villages Act delegated to Chicago the following power:

23-48. To regulate the use of harbors, towing of vessels, and the opening and passing of bridges.

While there are no limitations here on the scope of regulation, this grant of power must be read in conjunction with other legislative enactments covering the same subject matter. Effective March 1, 1960 the 1959 General Assembly passed an Act entitled "An Act for the registration of boats, providing for regulations pertaining to the operation thereof, providing penalties for the violation thereof, and repealing certain Acts herein named." (I. R. S. 1959, Ch. 95½, secs. 311 et seq.) Section 2 of Article I of said Act defines the term "motorboat." Section 7 of Article V, dealing with restriction of areas for their operation, provides in part:

No person shall operate a motorboat within a water area which has been clearly marked by buoys or some other distinguishing device as a bathing, fishing, swimming or otherwise restricted area by the Department (Department of Conservation of the State of Illinois) or a political subdivision of the State * * *. (Italics ours.)

Section 1 of Article VIII, on Local Regulation provides:

Section 1. Local ordinances.) The provisions of this Act, and of other applicable laws of this State shall govern the operation, equipment, numbering and all other matters relating thereto whenever any vessel shall be operated on the waters of this State, or when any activity regulated by this Act shall take place thereon; but nothing in this Act shall be construed to prevent the adoption of any ordinance or local law by any political subdivision of the State relating to operation and equipment of vessels the provisions of which are not inconsistent with the provisions of this Act, amendments thereto or regulations issued thereunder: Provided, that such ordinances or local laws shall be operative only so long as and to the extent that they continue to be not inconsistent with the provisions of this Act, amendments thereto or regulations issued thereunder.

Read together, the above provisions give to the City of Chicago authority to pass such ordinances relating to the use of the harbor as are not inconsistent with the state law above quoted. Therefore, the substitute ordinance transmitted herewith is designed to regulate the operation of motorboats along the Lake Michigan shore line in accordance with state regulations, which require the marking of all restricted areas by buoys or other distinguishing devices. As local restricted areas must be so designated, we have included an amendment to section 8.3-3 to set up the procedure for such designation.

LEGALITY OF POLICE BOARD HEARINGS

(President of the Police Board—C. H. L.—September 8, 1961)

We acknowledge receipt of your communication dated August 15, 1961 in which you write:

"We would like your written opinion as to whether or not it is legal to hold a hearing before the police board prior to the determination of the issues in the Criminal Court."

Prefacing our opinion in this matter we desire to call your attention to the following sections of the Revised Cities and Villages Act, the Cities Service Act and Rules of the Civil Service Commission having a hearing on the subject matter, and by which you are bound.

House Bill No. 573 in Senate, which was approved by the Governor on April 10, 1961, and which went into effect on July 1, 1961, of which Section 9-15.1, par. 4. is a part, gives the Police Board of the Department of Police of the City of Chicago the following power to:

"4. Serve as a board to hear disciplinary actions involving officers and civilian employees of the police department in the classified civil service of the city as provided in 'An Act to regulate the civil service of cities,' approved March 20, 1895, as amended."

Section 12 of the Cities Civil Service Act was amended (effective July 1, 1961) to include the following:

"except in any such city of more than 500,000 population where the board of rights and police board shall exercise such powers in respect to employees of the police department as provided in Section 12.1."

Section 12.1 of the Cities Civil Service Act which was approved by the governor on April 10, 1961 and which went into effect on July 1, 1961 provides as follows:

"Section 12.1. In any city of more than 500,000 population in which this Act is in operation, no officer or employee of the police department in the classified civil service of the city whose appointment has become complete shall be removed or discharged, or suspended for more than 30 days except for cause upon written charges and after an opportunity to be heard in his own defense by the Police Board.

Upon the filing of charges for which removal or discharge, or suspension of more than 30 days is recommended a hearing before the Police Board shall be held.

The Police Board shall establish rules of procedure not inconsistent with the provisions of this section respecting notice of charges and the conduct of the hearings before the Police Board. The Police Board shall not be bound by formal or technical rules of evidence, however hearsay evidence shall be inadmissible. The person against whom charges have been filed shall have the right to appear before the Police Board with counsel of his own choice and defend himself; shall have the right to be confronted by his accusers; shall have the right to cross-examine any witness giving evidence against him; and shall have the right by counsel to present witnesses and evidence in his own behalf.

The Police Board or any member designated by it, may administer oaths and secure by its subpoena both the attendance and testimony of witnesses and the production of relevant books and papers. All proceed-

ings before the Police Board shall be recorded. The findings and decision of the Police Board, when approved by said Board, shall be certified to the superintendent and shall forthwith be enforced by said superintendent.

The concurrence of a majority of the members of the Police Board shall be necessary for any disciplinary recommendation or action entered.

Nothing in this Act shall limit the power of the superintendent to suspend a subordinate for a reasonable period, not exceeding 30 days."

Section 41 of the Cities Civil Service Act which was approved by the governor on April 10, 1961 and which went into effect on July 1, 1961, provides as follows:

"Section 41. The provisions of the 'Administrative Review Act,' approved May 8, 1945, and all amendments and modifications thereof, and the rules adopted pursuant thereto, shall apply to and govern all proceedings for the judicial review of final administrative decisions of a Civil Service Commission, or of the Police Board of a city of more than 500,000 population. The term 'administrative decision' is defined as in Section 1 of said Administrative Review Act.

Section 2. This amendatory act of 1961 shall not apply to or affect any disciplinary proceeding involving officers or employees in the police department of a city of more than 500,000 population which is instituted and pending in the Civil Service Commission of the city on or prior to its effective date."

Your Board therefore supplants the Civil Service Commission as a body to exercise the function of conducting investigations or hearings on charges against employees of the Police Department filed by the Superintendent of Police, and is bound by the provisions of the Cities Civil Service Act and the Rules of the Civil Service Commission.

Section 4 of the Cities Civil Service Act authorizes the Civil Service Commission to make rules to carry out the purposes of the Act and for examinations, appointments and removals in accordance with the provisions of the Statute (Peo. ex rel *Carton v. Gregory*, 300 Ill. App. 172, December 31, 1946).

Section 41 of the Cities Civil Service Act provides:

"Section 41. Review under 'Administrative Review Act', approved May 8, 1945, and all amendments and modifications thereof, and the rules adopted pursuant thereto, shall apply to and govern all proceedings for the judicial review of final administrative decisions hereunder. The term 'administrative decision' is defined as in Section 1 of said 'Administrative Review Act'."

Section 1 of said Act provides:

"264. Section 1. (*Definitions.*) For the purposes of this Act: 1 'Administrative Agency' means a person, body of persons, group, officer, board, bureau, commission or department (Other than a court, judge, justice of the peace or magistrate) of the state or any political subdivision thereof or municipal corporation therein, having power under law to make administrative decisions.

'Administrative decision' or 'decision' means any decision, order or determination of any administrative agency rendered in a particular case, which affects the legal rights, duties or privileges of parties and which terminates the proceedings before the administrative agency
* * *".

Section 2 of the Act provides :

"Sec. 265. Sec. 2. (*Scope of Act.*) This Act 1 shall apply to and govern every action to review judicially a final decision of any administrative agency where the Act creating or conferring power on such agency, by express reference, adopts the provisions of this Act. In all such cases, any other statutory, equitable or common law mode of review of decisions of administrative agencies heretofore available shall not be employed after the effective date hereof.

Unless review is sought of an administrative decision within the time and in the manner herein provided, the parties to the proceeding before the administrative agency shall be barred from obtaining judicial review of such administrative decision. If under the terms of the Act governing the procedure before an administrative agency an administrative decision has become final because of the failure to file any document in the nature of objection, protest, petition for hearing or application for administrative review within the time allowed by such act, such decision shall not be subject to judicial review hereunder excepting only for the purpose of questioning the jurisdiction of the administrative agency over the person of subject matter."

Section 4 of said Act provides :

"267. Section 4. (*Commencement of action.*) Every action to review a final administrative decision shall be commenced by the filing of a complaint and the issuance of summons within thirty-five (35) days from the date that a copy of the decision sought to be reviewed was served upon the party affected thereby. The method of service of the decision shall be as provided in the Act of governing the procedure before the administrative agency, but if no method is provided, a decision shall be deemed to have been served either when personally delivered or when deposited in the United States mail, in a sealed envelope or package, with postage prepaid, addressed to the party affected thereby at his last known residence or place of business. The form of the summons and the issuance of alias and pluries writs shall be according to rule of the Supreme Court."

Rule VI, Section 1 and 2 of the Civil Service Commission's Rules, passed pursuant to authority conferred by Section 4 of the aforesaid Act reads as follows :

"Section 1. Charges. Charges shall be filed with the commission and shall state specifically the facts alleged to constitute the cause for discharge. Investigations of charges may be broad in their character and evidence may be heard upon any facts or circumstances pertinent or applicable to such charges."

"Section 2. Hearings. The Commission shall cause copies of written charges filed with it against any officer or employee in the classified service, to be served personally upon the officer or employee against whom such charges are filed, or shall have the same mailed to his address as shown by the records of the Commission, notifying him of the time and place of investigation of said charges. No such investigation shall be held less than five days after the serving or mailing of notice."

We suggest that in compliance with the aforesaid Statutes and Rules at a hearing conducted by the Board the following facts must appear in the record and transcript of the evidence taken at the hearing in order that all the elements of full legal jurisdiction will be recorded to show that the Board properly conducted the hearing which resulted in the decision of the Board :

(1) Written charges and specifications must be filed against the accused by the Superintendent of Police with the Police Board.

(2) Due notice of the time and place at which the hearing on said charges is to be held, together with a copy of said charges must be served on the accused more than five (5) days prior to the commencement of said hearing.

(3) The said hearing on said charges shall be conducted by the Board, and its decision rendered by a majority of the Board.

(4) The transcript of testimony must show that the accused was present in person throughout all of said hearing, that he was represented by legal counsel of his own selection thereat, and that all witnesses were sworn and testified under oath, and were subject to cross-examination throughout said hearing.

(5) Findings of fact and guilt were made against the accused by the Board upon which the further finding was made by the Board that legal cause existed warranting the discharge of the accused.

(6) The accused was found guilty of the charges (specify them).

(7) The said finding was certified to and received by the Superintendent of Police, who then ordered the accused discharged (specifying the date).

(8) The accused must be served with a copy of said finding ordering his discharge by a majority of the Police Board.

If the above suggestions are followed the courts cannot hear evidence in such case, as they have no power to inquire into the discretion and judgment of the Board.

Miller v. City of Chicago, 234 Ill. 416; *Carroll v. Houston*, 341 Ill. 531; *Hopkins v. Ames*, 344 Ill. 527.

We do not desire to burden you with a too lengthy discourse but it might be of interest to you to read what the courts have held in regard to cause.

Section 12 of the Cities Civil Service Act provides as quoted above:

"* * * No officer or employee in the Classified Civil Service * * * shall be removed or discharged except for Cause."

The questions of whether legal cause exists for the discharge or removal of a member of the classified civil service by the Chicago Civil Service Commission and what constitutes such legal cause therefor have been repeatedly held by the Appellate and Supreme Courts of this State to be exclusively within the province of said Civil Service Commission to decide.

By giving the power to discharge for cause the Legislature gave the Commission power to determine the existence of the cause.

In *People v. Higgins*, 15 Ill. 110, a judicial land-mark in the jurisprudence of this state upon the subject of removal of officers for cause, the court said, on page 114:

"* * * Here the trustees were charged with the general management of the institution, and were authorized to appoint a superintendent possessed of certain qualifications; and for the want of certain of those qualifications they might remove him. *They are not bound down by any legal rule of evidence, when determining as to the existence of those qualifications for the purpose of making the appointment; nor, on the other hand, are they thus restricted when determining upon the absence or want of certain qualifications, when acting upon the question of removal; they may determine that question upon their own observation, and exercising their own best judgment, as well as upon facts detailed by others, or upon the opinions of witnesses.* (Italics ours.)

In *Kamman v. City of Chicago*, 222 Ill. 64, the court said, on pages 65 and 66:

"The statute is silent as to what constitutes 'cause'. Manifestly the right to determine that question is left with the civil service commission, and *we have held that this statute does not require the commission to specify, in written rules, every case which shall be deemed cause for removal.* *Joyce v. City of Chicago*, 216 Ill. 466." (Italics ours.)

In the recent case of *Drury v. Hurley*, 339 Ill. App. 33, the court had this to say about "Cause":

"*It follows that since the statute does not define 'Cause', the legislature, as apparently recognized by the courts, left its definition and application to the discretion of the commission which under Section 12 of the Civil Service Act was thus empowered to determine, not merely what cause is sufficient to justify removal but also whether or not the accused was guilty of the cause charged. Accordingly, we think the trial Judge exceeded his authority in reviewing the commission's finding that a refusal to sign a waiver was 'cause' for dismissal. Inasmuch as the commission was established to administer the personnel affairs of the city and is charged with the duty of holding hearings to determine whether there is adequate cause for removal, courts should not reverse the commission's findings of 'Cause' unless the finding is so unrelated to the requirements of the service that it is unreasonable and, therefore, arbitrary.*" (Italics ours.)

In *Heaney v. City of Chicago*, 117 Ill. App. 405, the court said, at page 409:

"*We have nothing to do in this case with the justice of the finding which the Civil Service Commission made against the plaintiff in error or whether it erred in its rulings of law, if it made any, during the progress of the hearing which it gave him, or in its application of the law to the facts; nor had the Superior Court.*"

and continuing on page 411:

"The statute is that 'no officer or employee in the Classified civil service of any city, who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges and after and opportunity to be heard in his own defense. Such charges shall be investigated by or before said civil service commission, or by or before some officer or board appointed by said commission to conduct such investigation.' This, of course, implies that the written charges must state, a 'cause' for his removal. Which must be some substantial shortcomings which renders his continuance in his office or employment in some way detrimental to the discipline or efficiency of the service. But when that is conceded, a wide latitude is given to the Commission as to what will justify the separation from the service, provided only, the accused has been given the proper opportunity to know the nature of the charges, and to be heard in his own defense.

* * *

"It is contended, however, that the particular acts or omissions which constituted the evidence of the negligence or incompetency should have been specified in the written charges, to give jurisdiction to the Commission, or to render the proceedings regular and 'legally applicable.' We do not so understand the law. 'Negligence and incompetency' shown in a given piece of work is a cause sufficiently specifically designated; the particular occurrences or defaults which show the negligence and incompetency re evidence that such cause, viz., 'negligence and incompetency,' existed." (Italics ours.)

In *Joyce v. City of Chicago*, 120 Ill. App. 398, the Court said at pages 403-404:

"The Civil Service Act to prevent removal for political reasons, provided that no person in the classified service could be removed from his office or employment, 'except for cause upon written charges, and after an opportunity to be heard in his own defense. This implies, of course, that the written charges must state a 'cause' for removal and that this cause must be some substantial shortcoming, which renders his continuance in his office or employment in some way detrimental to the discipline or efficiency of the service. But, as we said in *Heaney v. City of Chicago*, *supra*, when that is conceded a wide latitude is given to the Commission as to what will justify the separation from the service, provided only, the accused has been given the proper opportunity to know the nature of the charges and to be heard in his own defense.

"To argue that no cause for such separation is sufficient unless it is shown to have been set down in some book of 'Rules and Regulations,' or some code accepted by the Civil Service Commission itself, or to say that 'making a false official return,' and 'conduct unbecoming a police officer,' are not sufficient causes, seems to us frivolous. If this construction were to be given the Civil Service Act, and contentions of this sort upheld, the act would be subversive of good municipal government, instead of an aid to it.

"Even if the specifications appended to the charge had not contained in themselves a substantial cause, the petitioner could take no advantage from that—if on his appearance and full hearing the Commission had found him guilty of the general charge, and that general charge had stated a good cause. The charges and specifications need not have the accuracy of an indictment. Their object is simply to apprise the officer or employee accused with reasonable certainty of the charges against him, so that he may have a fair opportunity to defend himself. But the specifications clearly enough describe an offense quite sufficient to warrant the petitioner's discharge. * * *" (Italics ours.)

The courts have in all administrative review cases held that the sole question for the Court to decide is whether the findings of the Civil Service

A few cases on this point will undoubtedly interest you.

In the case of *William Olsen v. Civil Service*, Circuit Court No. 59 C 5949 in which Judge Kluczinski found for plaintiff, the Appellate Court (28 Ill. App. 2d 146 (abst) on November 23, 1960 reversed the finding of the lower Court and presiding Justice Schwartz held at the conclusion of his opinion:

"It has been held repeatedly that in appeals under the Administrative Review Act, the reviewing Court is to consider the record for the purpose of determining whether the findings and orders of the Administrative agency were against the manifest weight of the evidence. *It has no authority to try the case anew or to substitute its judgment for that of the commission.* *Cropps v. The Industrial Commission*, 402 Ill. 606, 85 N. E. 2d 5; *Adamek v. Civil Service Commission*, 17 Ill. App. 2d 11, 149 N. E. 2d 466; *Arboit v. Gateway Transportation Co.*, 15 Ill. App. 2d 500, 146 N. E. 2d 582; *Nolting v. Civil Service Commission*, 7 Ill. App. 2d 147, 129 N. E. 2d 236. *By manifest weight is meant the clearly evident, plain and indisputable weight.* *Sayles v. Board of Fire & Police Comm'rs.*, 25 Ill. App. 2d 262, 166 N. E. 2d 469." (Italics ours.)

In *Nolting v. Civil Service Commission*, 7 Ill. App. 2d 147, decided in 1955, an administrative review case involving a patrolman of the City of Chicago, who was discharged after a hearing before the Civil Service Commission, the Court held, beginning at page 158:

"(5-7) An examination of the records in the cases now pending in this Division reveals how technical the procedure still is. The Adminis-

trative Review Act has been sustained and an appeal under it may be had to review all questions of law and of fact presented by the entire record. *The findings and conclusions of the administrative agency on questions of fact are to be considered prima facie true and correct. The reviewing court is required to determine from the entire record whether the findings are against the manifest weight of the evidence.* Section 11, Administrative Review Act (ch. 110, par. 274, Ill. Rev. Stat. 1953 Jones Ill. Stats. Ann. 104.094 (11); *Logan v. Civil Service Commission*, 3 Ill. 2d 81, 86-7; *Harrison v. Civil Service Commission of Chicago*, 1 Ill. 2d 137, 145-147; *Oswald v. Civil Service Commission*, 406 Ill. 506, 511; *Drezner v. Civil Service Commission*, 398 Ill. 219, 227. The offense charged in the instant case is amply supported by the evidence, is related to the requirements of the service, and is not trivial. What then is the power of the court with respect to determining whether the discharge was warranted? In *Murphy v. Houston*, 250 Ill. App. 385, the appellant, a police officer asserted that the charges filed against him with the Civil Service Commission did not state a cause for removal, and to this Commission replied that it was empowered to determine cause for removal and that the charges were based on rules of the department, of which the appellant had knowledge."

At page 159, the Court held:

"While it is true that it is for the commission to decide what is cause for removal, it may not make an arbitrary and unreasonable rule in this respect. In *Andrews v. King*, 77 Me. 224, a statute provided that an employee might not be removed except for cause. *The court held cause to mean some substantial short-coming which renders continuance in his office or employment in some way detrimental to the discipline and efficiency of the service and something which the law and a sound public opinion recognize as a good cause for his not longer occupying the place. This statement of the rule seems to be in harmony with the authorities, Throop on Public Officers. City of Chicago v. Condell*, 124 Ill. App. 64, reversed on a different point in *City of Chicago v. Condell*, 224 Ill. 595; *Heaney v. City of Chicago*, 117 Ill. App. 405; *Joyce v. City of Chicago*, 120 Ill. App. 398, 403, affirmed in 216 Ill. 466; *City of Chicago v. Gillen*, 124 Ill. App. 210; *Namsay v. Shelton*, 329 Ill. 432; *State ex rel. Gill v. Common Council of Watertown*, 9 Wis. 229." * * *

"Chicago has a population close to four million. Its Police Department consists of a force of 7,700 armed men. The commanding officer is the Commissioner of Police. He must carry out and execute his authority through a chain of command consisting of deputy commissioners, captains, lieutenants and sergeants. In a large metropolitan area the problems are many. We have only to examine the Criminal Code, the Cities and Villages Act, the City Ordinances and numerous other statutory provisions to become aware of the enforcement difficulties confronting the Police Department. The carrying out of these numerous responsibilities requires a department staffed with proper personnel, well trained and organized. Discipline, fairly and certainly applied, is vital to this force of armed men who protect this city. This is essential not only for members of the department but to maintain the respect of the public. Without it, a department becomes incompetent and demoralized. This requirement of discipline was emphasized long ago by a famous and revered judge of the Circuit Court, Murray F. Tuley, whose comments were quoted in *Coane v. Geary*, 298 Ill. App. 199 (1939) at p. 206. We quote therefrom:

"A police force is peculiar, *sui generis*, you may say, in its formation and in relation to the City government. It is practically an organized force resembling in many respects a military force, organized under the laws of the United States and equally as important as to the functions it is required to perform."

"And there is the same necessity of discipline of regulation existing in the police department that exists in regard to the military department."

Strict discipline must be enforced, and it must be enforced in a manner that is effective, and without the supervision or regulation of any other department of the state, and particularly, without any attempt on the part of the judicial department (which is a branch of the government entirely distinct and separate from the executive department) to regulate it in any way, and particularly, to regulate its discipline."

and at pages 161 and 162, the Court held :

"Punitive discipline in the Police Department of the City of Chicago is initiated by the Commissioner of Police. He files charges with the Civil Service Commission only after he has reached the conclusion that the offender should be discharged from the force. Thus at the outset these proceedings involve the exercise of judgment by an expert. In fact, we must assume that the head of the Police Department of the second largest city in the country is a leading expert in police matters. Not only is he in position to exercise a superior judgment with respect to the particular individual involved but he can judge the effect of the disciplinary action taken on the morale of his entire force. What happens to discipline when a judge substitutes his judgment for the judgment of this expert and restores to office and to a position under the Chief of Police one whom the Chief has deemed unfit for that purpose? The result is described in a book entitled 'Police Administration' by O. W. Wilson, a leading authority on the subject, as follows (p. 371) :

"From that time on (the chief of police) will have a subordinate who hates him, who is disloyal to him, and who will do everything in his power to put the chief in a disadvantageous position, regardless of the damage that may be done to the department and to the quality of the service. Protection of the employee is provided by the requirement that before he can be discharged, charges must be filed before the Civil Service Commission and a hearing granted to him. The Civil Service Commission while composed of laymen can employ experts and technicians to advise them and their day-to-day contact with the problems of the department gives them an opportunity for a far greater understanding of the requirements of discipline than any other agency. *To charge such executives with the responsibility of policing the city while judges have the final say as to disciplinary measures creates a dilemma that would frustrate and confuse an honest administration of the civil service law, while a corrupt and indifferent administration might well take advantage of it to shift the responsibility to the judiciary.*"

"Not a single case has come before us in recent years in which it has been charged, must less proved, that politics or bias motivated the administration of the civil service. To the honest and dutiful policeman the civil service law has become a shield. The protection afforded him is real. The community has given these officers a security of employment which few, if any, in labor, industry, the professions, academic or business life have. It should be so because this is an employment which requires loyalty, courage and character of a high order. The other side of the coin is that these employees are subject to pressures and temptations such as exist in no other occupation. A review of the cases of the past few years will reveal the sordid and evil character of these temptations. Discipline, as we have said, is vital or this force of armed men who protect the city can become a haven for bullies officially armed with guns or the instrument of corrupt forces looking for an opportunity to prey on the city's inhabitants. The Civil Service Act therefore must not be permitted to become a mantle for the corrupt and inefficient. *If the court is to substitute its judgment for the judgment of the Civil Service Commission and of the Commission and of the Commissioner of Police as to disciplinary action that that should be taken, it would in effect be substituting judicial discipline without responsibility for executive discipline with responsibility. The ultimate effect of such action would be breaking down of the discipline and morale of the Police Department. Courts must accept the honest judgment of the Chief of Police and the Civil*

Service Commission, those arms of the executive department charged with administration of the police, with respect to the proper discipline to be enforced when charges have been proved."

and at page 163 the Court concluded :

"The court can only weigh the evidence for the purpose of determining whether the findings of the Commission with respect to the proof offered in support of charges are against the manifest weight.

(9) The court can only review the nature of the offense and the penalty for the purpose of determining whether the offense was related to the requirements of the service and whether the ruling was arbitrary or capricious.

(10, 11) The Civil Service Commission is not a judicial tribunal even though it has been called 'quasi-judicial' in the sense that its findings could be examined on certiorari. The hiring and discharging of employees in the civil service is still an executive function.

In appeals from a Civil Service Commission there should be recognition by the courts that the relationship of the executive department to its employees is involved and that the discipline of an entire department may be affected. The distinction set forth in *City of Aurora v. Schoeberlein, supra*, between such cases and those involving agencies which regulate utilities or deal with workmen's compensation should be maintained.

The judgment of the circuit court is reversed and the decision and findings of the Civil Service Commission are affirmed.

Judgment reversed." (Italics ours.)

In conclusion, answering your query we quote from *Pco. ex rel. Day v. Lewis*, 376 Ill. 509 where the Court held at page 515, quoting from *Kavanaugh v. Paull*, 177 Atl. (R. I.) 352 :

"It is not well to confuse the powers of administrative and executive bodies to remove subordinates for any conduct showing unfitness for place or position, with the proceedings of courts of justice to punish crimes. They are essentially different in their object and may and do exist and move in their respective sphere without collision or inconsistency."

We are therefore, under the provisions of the aforesaid Section 12 of the Cities Civil Service Act and Rule VI, sections 1 and 2 of the Civil Service Commission's Rules of the opinion that you have the necessary authority to hold a hearing upon charges and to determine the issues regardless of any determination of a criminal case in the Criminal Court.

BENEVOLENT ASSOCIATION'S RIGHT TO NEGOTIATE

(Chief Operating Engineer, Department of Police—S. R. D.—November 11, 1961)

We acknowledge receipt of your letter of November 1, 1961 stating that an ordinance dated November 9, 1955 had been brought to your attention whereby the Policemen's Benevolent Association was granted permission to install automatic dispensing machines in police buildings and derive the revenue therefrom. You further state that up to the present time "no advantage of this ordinance has been taken by the P. B. A."

You ask whether the ordinance is still valid and whether the Police-men's Benevolent Association has the right to negotiate with various companies for this service without using the facilities of the Department of Purchasing.

On November 9, 1955 (Council Proceedings of November 9, 1955, p. 1414) the City Council enacted the following ordinance:

"Be it ordained by the City Council of the City of Chicago:

"Section 1. That the Commissioner of Public Works be authorized to execute, on behalf of the City of Chicago, an agreement granting the Policemen's Benevolent Association the right to install and operate automatic coffee and hot chocolate dispensing machines in the various police stations and police garages in the City.

"The Policemen's Benevolent Association agrees it will pay all charges for installation, operation and maintenance of the machines, secure all permits and licenses which may be required under all Federal, State and Local laws, and hold the City harmless from all loss, expense, etc. arising from the use of the machines.

"The Policemen's Benevolent Association agrees to pay the City \$1.00 per year for all locations.

"The agreement shall remain in force for one year and from year to year thereafter, subject to termination by either party at any time thereafter upon 30 days written notice.

"Section 2. This ordinance shall be in force and effect after its passage and approval."

Section 8-5 of the Municipal Code of Chicago provides in part as follows:

"It shall be the duty of the commissioner of public works, subject to the provisions hereof and the ordinances of the city, to take special charge and superintendence of the following public places and property:

* * * * *

"All public buildings in the city belonging to the city; * * *."

When the Police Department was reorganized and the Police Board was created (Council Proceedings of March 2, 1960, pp. 2059-2063) it was provided in part as follows:

"Section 11-9. The Board shall have the custody and control of the offices, stations and other public buildings occupied by the police department or any division thereof, equipment, books, records, and other property belonging to said department."

Section 11-9, in effect nullifies the ordinance of November 9, 1955 because it takes the custody and control of "the offices, stations, and other public buildings occupied by the police department or any division thereof" from the Commissioner of Public Works and places the custody and control thereof with the Police Board.

In light of the foregoing, it is unnecessary for us to answer your second question pertaining to the Department of Purchasing.

DESTRUCTION OF RECORDS

*(Director, Records and Communication, Chicago Police Department
—A. F. G.—January 25, 1962)*

Your letter of January 11, 1962 is as follows:

"The Records Division of the Chicago Police Department requests that an opinion be rendered by the office of the Corporation Counsel regarding the change in Chapter 116 of the Illinois Revised Statutes of 1961 (Titled Local Records Act) that effect the Retention and Disposition of Police Department Records.

On 18 August 1961, paragraphs 31 to 34.1 of Chapter 116. Illinois Revised Statutes titled 'Copy of Records on Film'—an Act of 16 July 1943—were repealed. Paragraph 33, Section 3 of this Act stated that 'Whenever such representations are placed in conveniently accessible files and provision is made for preserving, examining and using the same, any such officer may authorize or provide for the destruction of his original records, papers or documents which have been on file for ten years.'

There is no provision in the new Statute that stipulates the number of years that records must be retained.

It is our request that an opinion be rendered clarifying the number of years that Police Department records must be retained and procedures we must follow to dispose of these records."

The Act referred to in your letter which provided the method and procedure for the destruction by municipal officers of public records, which had been on file in their offices for ten years was repealed at the recent session of the General Assembly. A new Act entitled "Local Records Act," was enacted in its stead. The new Act does not set out the procedure for the destruction of municipal records, but provides for the creation of a "Local Records Commission", which for Chicago consists of the president of the county board of Cook County, the mayor of Chicago, the State's attorney of Cook County, the County comptroller of Cook County, the State archivist and the State historian. The president of the county board is to be chairman of the commission.

By section 7 of the new Act, the Local Records Commission has been given the following powers.

"Section 7. Except as otherwise provided by law, no public record shall be disposed of by any officer or agency unless the written approval of the appropriate Local Records Commission is first obtained.

The Commission shall issue regulations which shall be binding on all such officers. Such regulations shall establish procedures for compiling and submitting to the Commission lists and schedules of public records proposed for disposal; procedures for the physical destruction or other disposition of such public records; and standards for the reproduction of such public records by photography or microphotographic processes. Such standards shall relate to the quality of the film to be used, preparation of the public records for filming, proper identification matter on such records so that an individual document or series of documents can be located on the film with reasonable facility, and that the copies contain all significant record detail, to the end that the copies will be adequate."

Until the Commission formulates regulations as provided in the said section, no municipal officer shall destroy public records of his office. However, if the city council had authorized the destruction of records included in the list furnished to that body, and all of the records so listed and approved for destruction had not been destroyed at the date of the repeal of the Act which authorized their destruction, the officer may continue to destroy such records.

REPRODUCTION OF RECORDS

(City Comptroller—R. N.—January 29, 1962)

In your letter of January 19, 1962 you ask the opinion of the law department concerning a set of circumstances which, in brief, may be restated as follows:

The police department maintains files on traffic accidents. That department permits representatives of insurance companies and attorneys to review these files and make copies of excerpts therefrom. This entails the services of a substantial number of employees of the police department in locating the files, making them available to those seeking the information, and refiling the files. No fees are charged, although a considerable number of man-hours go into the process. You state in your letter:

To reduce payroll and make this activity self sustaining the Police Department plan to make mechanical reproductions of the claims (reports) requested and to charge a fee of \$.50 per page reproduced. This will provide better service for the public and avoid congestion in the records section.

* * * *

We would like an opinion as to the following:

(1) Whether an ordinance is required to permit the police department to make a charge for furnishing reproductions of accident claims. (reports)

The traffic accident report file is maintained pursuant to section 27-390 of the Code, which reads:

(a) The traffic bureau shall maintain a suitable system of filing traffic accident reports. Accident reports or cards referring to them shall be filed alphabetically by location. Such reports shall be available for the use and information of the commissioner of streets and sanitation.

(b) The traffic bureau shall receive and properly file all accident reports made to it under state law or under any ordinance of this city, but all such accident reports made by drivers shall be for the confidential use of the police department, the commissioner of streets and sanitation, and other officers of the city for official use.

By section 3 of the Local Records Act (I. R. S. 1961, Ch. 116, § 43.103) a public record is defined as:

"Public record" means any book, paper, map, photograph, or other official documentary material, regardless of physical form or characteristics, made, produced, executed or received by any agency or officer pursuant to law or in connection with the transaction of public business and preserved or appropriate for preservation by such agency or officer, or any successor thereof, as evidence of the organization, function, policies, decisions, procedures, or other activities thereof, or because of the informational data contained therein. Library and museum material

made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included within the definition of public record.

Clearly, the traffic accident report file maintained by the traffic bureau of the police department falls in the category of a public record. It does not necessarily follow, however, that such record is open to public inspection as a general right. This subject has been covered in its every aspect in an opinion written March 1, 1960 by Assistant Corporation Counsel Al F. Gorman which appears in full at page 108 of Volume 24 of Opinions of the Corporation Counsel, recently issued by this department.

You will note that in the penultimate paragraph of the foregoing opinion it is clearly stated that "neither under the common law, the statutes or under the ordinance referred to above is any duty imposed * * * to permit the records of your office to be copied by persons desiring the information * * * for use in their personal business affairs. However, public officials in this city have always extended this courtesy * * * subject to reasonable regulations * * *."

This brings us to a consideration of paragraph (b) of section 27-390 of the Code quoted at the beginning of this opinion, which states in part: "but all such accident reports * * * shall be for the confidential use of the police department, the commissioner of streets and sanitation, and other officers of the city for official use." This, then, is the law of the city as enacted by our city council which precludes the right of public inspection as a matter of courtesy and by its terms restricts the examination of such records to the persons specified therein. It is therefore our opinion that the inspection of the records of traffic accidents by persons other than those enumerated in section 27-390 cannot be allowed by the department of police, and so it becomes unnecessary for us to answer the other questions submitted by you.

Copy of opinion of March 1, 1960 is enclosed herewith for your convenience.

POLICE CADETS

(Superintendent of Police—J. C. M.—July 18, 1962)

We have given consideration to the Police Cadet Program as outlined in your letter of June 28, 1962. In order to put the program into effect with the least amount of legislation, it is our opinion to exclude a Police Cadet from Civil Service classification and have prepared an amendment to Section 10-1-17 of the Illinois Municipal Code (Chapter 24, Illinois Revised Statutes) which provides for the insertion of the words "police cadets" following the words "police officers above the grade of captain."

It is our further suggestion that Rule IV of the Civil Service Commission be amended by adding the following paragraph:

A Police Cadet shall be on probation from the date of his appointment as such until he has successfully passed the patrolman's entrance examination after he has reached his 21st birthday, has qualified and has been certified to the Department Head as a patrolman. Upon entering his duties as a patrolman, he shall be on probation as a patrolman for the period of 6 months in the same manner as original appointed patrolmen. We are enclosing herewith a copy of a proposed Bill to be entered by the legislation and a copy of the proposed amendment to Rule IV.

Any suggestions that you may have relative thereto will be appreciated.

ARRESTING PICKETERS

(Superintendent of Police—J. C. M.—September 12, 1962)

In your letter of September 10, 1962 you refer to a labor strike now in progress at the firm known as International Rolling Mills, Inc., 5000 Whipple Street. There seems to be some question as to whether a public or private street is involved in the area where pickets are operating.

In matters of this kind, the City does not determine titles to property.

In answer to your inquiries appearing on page two of your letter, it is our opinion:

- (1) That a Chicago police officer should not on complaint of an owner or tenant who is willing to sign a complaint authorize to effect an on-view arrest of pickets who are picketing on private property. The owner or tenants can go to the Municipal Court and apply for a warrant or they can file suit in the Circuit Court for injunctive relief.

We do not believe the Police Department should take part in such problems.

- (2) What we stated under above paragraph one also applies to shopping centers.
- (3) The fact that the private property is posted as such does not alter the action of the Police Department in either of the two above examples.

SEARCH OF RECORDS

(Superintendent of Police—M. M.—March 4, 1963)

Your letter of February 27, 1963, wherein you request an opinion as to what authority, if any, the Police Department has to examine books and records of applicants for retail liquor licenses and licensees of same in Chicago, has been referred to me.

As a general matter, the Police Department does not have authority to seize or confiscate books or records without a proper search warrant or other order of Court.

However, Section 4 of Article IV of the Illinois Liquor Control Act provides:

"The Local Liquor Control Commissioner shall have the right . . . to examine or cause to be examined, the books and records of any such applicant or licensee; . . . For the purpose of obtaining any of the information desired by the Local Liquor Control Commissioner under this section, he may authorize his agent to act on his behalf."

In addition, the Rules and Regulations of the Illinois Liquor Control Commission, Article XIII, Rule 14, Books and Records, subparagraph 6, Retailer, provides as follows:

"It shall be the duty of retailers to keep books and records at licensed premises at all times for the purpose of investigation and control."

It is our opinion, therefore, that the Police Department as investigating agent for the Local Liquor Control Commissioner has the authority to examine the books and records of applicants and licensees and if said information is refused, then a license could be denied to an applicant and a revocation proceeding against a licensee could be instituted.

MISREPRESENTATION

(Superintendent of Police—E. V. P.—September 18, 1963)

We have your letter of September 10, 1963, advising that certain devices are being manufactured and sold both locally and nationally which on their face bear the lettering, Chicago Police Department. You enclose a copy of page 38, of the September, 1963 Law and Order Magazine, which illustrates a representative example of these items.

You request our opinion as to whether your department has a proprietary interest in the wording "Chicago Police Department." You ask whether we have the right to request that the manufacture or sale of such an item be discontinued either locally or nationally. You further inquire as to whether it will be feasible to prepare an ordinance which would prohibit the sale or display of any device which bears the lettering "Chicago Police Department" that is not department property or not authorized by the department.

Section 11-47 of the Municipal Code provides as follows:

"No person shall falsely assume or pretend to be a policeman or a member of the department of police of this city, or, without being a member of the department of police of this city, wear in public the uniform adopted as the police uniform.

No person shall counterfeit or imitate, or cause to be counterfeited or imitated, any badge, sign, signal or device adopted by the department of police. Nor shall any person use or wear any badge, sign, signal or device adopted or used by said department or any similar in appearance, without authority so to do from the Board.

Any person violating any of the provisions of this section shall be fined not less than ten dollars nor more than one hundred dollars for each offense."

We are of the opinion that under our Code the Chicago Police Department has a proprietary interest in the wording "Chicago Police Department" and that you have a right to request that the sale of such items as you describe and as represented by the exhibit attached to your letter be discontinued either locally or nationally.

It is further our opinion that the City has the power to further fortify its position to prohibit the manufacture, sale or display of any device which bears the caption "Chicago Police Department" or similar significance that is not department property or authorized by the department.

We are attaching herewith a proposed amendment to Sec. 11-47 and if it meets with your approval as to language it should be introduced at the next Council Meeting.

RIGHT TO ARREST DETERMINED BY BOUNDARY

(District Commander, 15th District—A. F. G.—November 22, 1963)

A question has been raised by one of the officers of the Austin District as to the right of a Chicago policeman to make an arrest on a boundary street which lies partly within Chicago and partly within the adjoining municipality, where the offense is committed on that portion of the street outside of the Chicago limits.

The situation is specifically provided for by our state statute which reads as follows:

§ 7-4-7. Police district.) The territory which is embraced within the corporate limits of adjoining municipalities within any county in this State shall be a police district.

§ 7-4-8. Powers of police throughout district.) The police of any municipality in such a police district may go into any part of the district to suppress a riot, to preserve the peace, and to protect the lives, rights, and property of citizens. For these purposes the mayor of any municipality in the district, and the chiefs of police therein, shall use the police forces under their control anywhere in the district. (I. R. S. 1961, Ch. 24, secs. 7-4-7 and 7-4-8.)

In answer to the officer's specific inquiry, we are of the opinion that a Chicago policeman has the right to arrest a law violator whose offense is committed beyond the center line of a boundary street separating Chicago and another municipality within Cook County.

Copy of the inquiry addressed to this department is enclosed herewith.

ENTERING INTO PRIVATE ENTERPRISE

(Superintendent of Police—R. L. M.—April 7, 1964)

Your letter of March 20, 1964, requests our opinion as to the legality of a proposed agreement with Lutter, Maremont and Company, Inc., a copy of which was attached thereto, and specifically requests our answers to two questions which you advise us have been answered by your staff "yes" and "no" respectively.

Please be advised that it is our opinion that the answer to the first question posed should be "no" rather than the "yes" presumed by your staff. It is our opinion that the City cannot legally enter into an agreement of this type. In view of this position on the first question, no answer is necessary to the second.

Pursuant to the enabling statute of the Purchasing Act, the City has entered into an agreement with IBM for the lease of certain electronic computers and other machines. These machines are leased by the City for the use of the City for public benefit and cannot be used by any private parties for private gain. There is a point of separation between public functions and private enterprise, and the City, as a municipal corporation, cannot legally enter beyond this point and extend into private enterprise in the absence of specific statutory authority. The sub-leasing of the City leased computer machines would be an extension into the field of private enterprise. See McQuillin, The Law of Municipal Corporations, Sections 28.37 and 28.38.

Further, although the Purchasing Act gives the City the power to *lease*, nowhere is the City given the power to *sublease*.

It is our further opinion that there is in fact a Constitutional prohibition to an arrangement as proposed insofar as the Illinois Constitution prohibits any city lending its credit in aid of a private corporation. Since the City has been extended credit by IBM in the lease arrangement, allowing Lutter, Maremont to use these machines for their private gain would certainly be considered a loaning to them, a private corporation, of credit which definitely aids them to make a profit from their private clients.

We see nothing legally objectionable in contracting for the professional services of IBM Computer Programmers on a non-advertised basis pursuant to Section 8-10-4 of the Purchasing Act. Our only objection is to the sublease provisions of the agreement as proposed as related to the City leased computer.

If we can be of further service to you in this matter, please feel free to call upon us at your convenience.

WATCHMAN

(Superintendent of Police—M. E. A. & S. R. D.—July 2, 1964)

We have your letter of June 17, 1964 in which you request an opinion as to the following legal questions:

"1.

Is a watchman (not employed by a private detective agency) required to obtain a license as a private detective from the state? From the city?

2.

Is this watchman required to obtain a permit from the city as a special policeman?

3.

Is a person who is employed to patrol a residential or commercial area, as distinguished from a specific premises, considered to be a watchman within the meaning of Article 24, Section 38, Illinois Revised Statutes?

4.

Do I have authority as Superintendent of Police to issue a permit to a special policeman to perform watchman duties in an area of the city embracing a number of commercial or residential premises?

5.

Must a Chicago policeman who obtains secondary employment as a guard or watchman, obtain a license as a private detective under the state law or city ordinance?"

In response to these legal questions, we submit the following:

1.

A watchman, not employed by a private detective agency, is required to obtain a license as a private detective from the state. Section 608b of the Detective Licensing Act (Illinois Revised Statutes 1963, Ch. 38, par. 608b) provides in part that the private detective business, for state licensing purposes, includes "any individual who shall for hire patrol, *watch or guard any residential, industrial or business property or district*, or the business of performing the service of such guard, or other person for any of said purposes" (emphasis added). Section 608b further defines a private detective as

"any person who, singly, conducts a private detective business without the assistance of any employee". There is no ordinance requiring a watchman, not employed by a private detective agency, to obtain a license as a private detective from the city. Whereas, the definition of a private detective in the state licensing provisions apparently includes those persons engaged in activities of a watchman, the provisions of the appropriate municipal ordinances do not include such.

Section 117-1 of the Municipal Code of Chicago reads in part that "no person shall advertise or hold himself out for hire as a private detective or detective agency without first obtaining a license to engage in the business as a private detective or detective agency". The business of providing watchman service is not generally thought to be activities of a private detective or detective agency. Section 117-1, unlike Section 608b, does not expressly incorporate the activities of a watchman into the business of a private detective for licensing purposes.

2.

This watchman is not required to obtain a permit from the city as a special policeman. Section 173-1 of the Municipal Code of Chicago defines "special policeman" as "any person who, for hire or reward, shall guard or protect any building, structure, premises, person, or property within the city" (excluding legally appointed peace officers and special policemen engaged in interstate activities). This provision of the Municipal Code has previously been construed by the Corporation Counsel as not applicable to watchmen. Opinion No. 11054, Volume 22, Opinions of the Corporation Counsel reads in part as follows (p. 351) :

"So far as the inquiry is concerned the agents employed by this particular watch service are not required to be licensed as special policemen under chapter 173 of the Municipal Code because there is no express or implied power in the city to prohibit any person from engaging in the business of furnishing watchmen who are not invested with the powers of conservators of the peace, as are regular and special policemen. * * *"

3.

A person who is employed to patrol a residential or commercial area, as distinguished from a specified premises, is considered to be a watchman within the meaning of the Illinois Criminal Code (Illinois Revised Statutes 1963, Ch. 38, pars. 24-1 *et seq.*). Section 24-2 (a) (4) exempts watchmen from the sanctions against carrying concealed firearms [provided, that the watchman has complied with the provisions of Section 183-7 of the Municipal Code of Chicago]. Section 608b of the Detective Licensing Act (Illinois Revised Statutes 1963, Ch. 38, par. 608b) defines a private detective to include a watchman of "any residential, industrial or business property or district". Therefore, if a residential or commercial area is properly delineated, a watchman of that area is entitled to the same exemption as a watchman for a specified premises.

4.

As Superintendent of Police, you have authority to issue a permit to a special policeman to perform watchman duties in an area of the city embracing a number of commercial or residential premises (Chapter 173 of the Municipal Code of Chicago). Opinion No. 12081, Volume 24, Opinions of the Corporation Counsel reads in part (p. 417) :

"Persons commissioned as special policemen possess all the powers of regular policemen, but the place where its powers are to be exercised must be definitely and clearly circumscribed."

"It is within the discretion of the commissioner [superintendent] of police to determine whether one commissioned for a special policeman shall suffice for more than one location, but if a commission is issued for more than one location each place should be definitely described in the commission."

5.

A Chicago policeman who obtains a secondary employment as a guard or watchman must obtain a license as a private detective pursuant to Illinois Revised Statutes 1963, Ch. 38, par. 608b and/or Section 117-1 of the Municipal Code of Chicago (pursuant to the requisites for such as discussed in Point 1 of this letter). Although a Chicago police officer is authorized to carry a concealed weapon pursuant to Section 24-2 of the Criminal Code, when he is engaged in private employment as a watchman or guard capacity, he must still comply with the appropriate licensing provisions for those activities. His standing as a Chicago police officer exempts him from the laws relating to concealed weapons, but does not exempt him from licensing provisions for a non-official, private venture.

CONFIDENTIAL NATURE OF INTELLIGENCE RECORDS

(Acting Superintendent of Police—J. C. M.—July 31, 1964)

In your letter of July 30, 1964 you advise that the Superintendent of Police and Lt. Edward H. Barry of the Intelligence Division have been subpoenaed to testify in an evidence deposition on August 5th in the libel suit brought by *Anthony Tisci v. The Chicago American*, and you pose the question as to whether or not the records of the Intelligence Division are confidential.

It is our opinion that these records are for the sole use of the Police Department and are not public records as required by law. The records contain information to serve the various divisions of the Police Department and in our opinion they are confidential. Under the circumstances, you will not disclose any of the records at the taking of said deposition.

We will have an Assistant Corporation Counsel present with the Superintendent of Police and Lt. Barry at the office of DeLois Cook Collins, 123 W. Madison Street when said deposition is taken there on Wednesday, August 5, 1964 at 2:00 P. M.

ASSEMBLAGE OF INFAMOUS PEOPLE

(Acting Superintendent of Police—E. W. P.—December 4, 1964)

We are in receipt of your letter of November 27, 1964 in which you write as follows:

"Magistrate Marilyn Komosa has stated that in her opinion Section 192-6 (Assembling of Infamous People) of the Municipal Code of Chicago is unconstitutional and invalid and persons appearing before her on this charge would have to be discharged.

Your opinion is requested as to the validity of this ordinance and, if valid, what elements must be established to secure a guilty finding."

Chapter 192 deals with Public Morals and Section 192-6 provides as follows:

"192-6. It shall be unlawful for any habitual drunkard, any person known to be a narcotic addict, any person known to be a prostitute, or any person who aids or abets prostitution, or for any person previously convicted of a felony, of prostitution, or of aiding and abetting prostitution, to assemble or congregate with other persons of any of the fore-

going classes in or upon the public ways or other public places in the city, or to loaf or loiter in or about or frequent the premises of any place where intoxicating liquors are sold."

The City has the power to enact this ordinance under Chap. 24, Par. 11-5-2 of the Municipal Code in the Illinois Revised Statutes, which reads as follows:

"The corporate authorities of each municipality may prevent or suppress riots, routs, affrays, noises, disturbances, and *disorderly assemblies in any public or private place*. 1961, May 29, Laws 1961, p. 576, § 11-5-2." (Italics supplied.)

The question arises as to whether or not the assembly or congregation described in the section is an unlawful assembly. It has been said that at common law there need not be a common purpose of such assembly, except such as might be implied by assembling in such a manner as tended to endanger the public peace and excite fear and alarm among the people. (*State v. Lustig*, 80 A. 2d 309, 13 N. J. Super. 149.)

We believe in reading this Section 2 that the assembly or congregation should consist of three or more people known to be habitual drunkards or in the other categories as described in the section. Their assembling together, in our opinion, would be reasonably likely to give firm and courageous persons in the neighborhood of such assembly ground to apprehend a breach of the peace in consequence of it. (*Aron v. City of Wausau*, 74 N. W. 354, 98 Wis. 592.)

Another case decided in New Jersey holds that where the object of the assembly is not unlawful, it is essential, in order to constitute it an unlawful assembly, that the meeting be held and conducted in such a manner as reasonably to create in the minds of firm and courageous persons a well founded fear of threatened danger to the public peace. (*State v. Butterworth*, 142 A. 57, 104 N. J. Law 579, 58 A. L. R. 744.)

We believe that the section is valid and constitutional. However, you also inquire as to the elements necessary to secure a guilty finding. First, of course, you have to prove that the person or persons apprehended in the assembly are known to fall within the categories of felons, or prostitutes, or habitual drunkards, or other persons named in the section and that they are assembling and loitering in the public ways or other public places in the City, in or about or frequent the premises where intoxicating liquors are sold. You should advise the Assistant Corporation Counsel of all other instances surrounding the record of the defendant or defendants and introduce in the proceeding by competent evidence the previous records. We believe that when you have done this you have proved all of the elements necessary to obtain a guilty finding under Section 192-6.

ILLEGAL TO CURB VEHICLES FOR AIR POLLUTION CONTROL

(Director, Department of Air Pollution Control—D. P. D. & S. R. D.
—March 24, 1965)

In your letter of March 4, 1965, you requested a legal opinion regarding a proposed plan to have inspectors, using a marked patrol car equipped with a red flasher and spotlight, curb vehicles which are emitting smoke in violation of Sections 17-23 and 17-32 of the Municipal Code of Chicago relating to air pollution control.

Under Section 107-3 of the Code of Criminal Procedure 1963 (Ill. Rev. Stat. 1963 Chap. 38 par. 107-3), any person may arrest another when he has reasonable grounds to believe that an offense other *than an ordinance violation* is being committed. No such restriction is placed on a police officer, who may arrest any person if he has reasonable grounds to believe that the person is committing or has committed an offense. The investigators for the Department of Air Pollution have no other authority than that of a private citizen and therefore cannot arrest for a violation of the City ordinances.

Mr. Kason, of your department, has orally stated that in certain jurisdictions, such as California and Ohio, the employees of the department of air pollution possess police powers. However, under Illinois law no such authority exists.

The proposed plan of curbing vehicles would, in our opinion constitute a technical arrest, since implicit in the action of curbing a vehicle is restraint of the individual.

While the purpose of curbing a vehicle is to obtain information to be used in preparing a citation or for preparation of a law suit, unless some alternative method other than restraining motorists can be found to obtain this information, the proposed procedure is illegal under existing law.

GROUND'S FOR ARREST OF NAZIS

(Superintendent of Police—M. E. A. & S. R. D.—June 9, 1965)

Reference is made to your letter of June 3, 1965 in which you request our opinion as to "whether action on the part of the police to arrest or disburse Nazis would be legal solely on the basis of their uniforms and armbands or whether additional overt acts on their part, such as the displaying of defamatory signs or other provocative acts, would be necessary before police action would be warranted."

Briefly, it is our opinion that in order to justify police action to arrest or disburse Nazis, the persons to be arrested must commit some overt act other than the wearing of a uniform or armband.

The question posed by you, however, cannot be fully answered without an examination of pertinent constitutional provisions. The application of these provisions to a problem situation such as the instant one is discussed fully in 16 C. J. S. Constitutional Law § 214, p. 1162 (1956). Pertinent portions of the discussion therein are set forth as follows:

"The rights of free assembly for lawful purposes and to petition the government for redress of grievances are sacred human liberties, which are of the very essence of democracy, and they are fundamental and inherent rights of a free government antedating the adoption of our various constitutions. As a safeguard against aggression, these rights have been incorporated into the First Amendment to the federal Constitution and into various state constitutions, so that the freedom and liberty to hold assemblies for lawful purposes and in a lawful manner without governmental interference or hindrance is protected by the federal Constitution."

* * * * *

"[N]evertheless the due process clause of the Fourteenth Amendment protects the right of assembly and of petition from state action. The right of petition is no more sacred than is the right of free speech, and the principles governing the right of free speech and of assembly are the same. The constitutional right of free assembly is a special form of free

speech, to which the legal philosophy governing free speech applies. These rights, although not identical, are inseparable and are cognate rights."

* * * * *

"The rights of assembly and of petition are to be construed liberally, and complete freedom remains the rule, unless and until regulated or restricted on rational grounds relating to the public welfare. The state cannot control the influence of a public forum by censoring the ideas, the proponents, or the audience, and cannot frustrate the purpose of a forum to interchange ideas by a censorship that would label certain convictions and affiliations suspect, denying the privilege of assembly to those who hold them, but granting it to those whose convictions and affiliations happen to be acceptable."

* * * * *

"Included in the rights of assembly and petition is the right of exercising them in union with others through membership in organizations seeking political or economic change."

* * * * *

"The right to free assembly cannot be abridged merely because persons threaten to stage a riot or because peace officers believe or are afraid that breaches of the peace will occur if the rights are exercised.

"*Clear and present danger rule.* It is now the generally accepted rule that freedom of assembly and of petition is susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. In other words, any attempt to restrict freedom of assembly must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger . . . The danger must have existed at the time the acts complained of were committed, and the state cannot enforce a precautionary measure that would deny the right of assembly to those whose political creeds it disapproves. On the other hand, where clear and present danger is shown, freedom of assembly and petition may be restricted."

Illustrative of these principles is the case of *Rockwell v. Morris*, 211 N. Y. S. 2d 25, 12 A. D. 2d 272, app. dism. 215 N. Y. S. 2d 502, 9 N. Y. 2d 791, 175 N. E. 2d 162, affd. 219 N. Y. S. 2d 268, 10 N. Y. 2d 721, 176 N. E. 2d 836, cert. den. 82 S. Ct. 194, 368 U. S. 913, 7 L. Ed. 2d 131. In this case, George Lincoln Rockwell sought a license to speak in Union Square Park in New York City. The Commissioner of Parks denied the application for a license and Rockwell appealed to the Appellate Division of the New York Supreme Court. The Appellate Division held that Rockwell, "a self-styled American Nazi and reputedly a rabid racist" could not be deprived of the license in question. The United States Supreme Court refused to disturb this decision. The opinion of the New York Appellate Division contains this pertinent language (211 N. Y. 2d 25, 35-36) :

"A community need not wait to be subverted by street riots and storm-troopers; but, also, it cannot, by its policemen or commissioners, suppress a speaker, in prior restraint, on the basis of news reports, hysteria, or inference that what he did yesterday, he will do today. Thus, too, if the speaker incites others to immediate unlawful action he may be punished—in a proper case, stopped when disorder actually impends; but this is not to be confused with unlawful action from others who seek unlawfully to suppress or punish the speaker.

"So, the unpopularity of views, their shocking quality, their obnoxiousness, and even their alarming impact is not enough. Otherwise, the preacher of any strange doctrine could be stopped; the anti-racist himself could be suppressed, if he undertakes to speak in 'restricted' areas; and one who asks that public schools be open indiscriminately to all ethnic groups could be lawfully suppressed, if only he choose to speak where persuasion is needed most.

* * * * *

"Only if Rockwell speaks criminally (or, perhaps, if it is established on a proper record, in that very rare case, that he will speak criminally, not because he once did, but that he will this time, and irreparable harm will ensue) can his right to speak be cut off. If he does not speak criminally, then, of course, his right to speak may not be cut off, no matter how offensive his speech may be to others. Instead, his right, and that of those who wish to listen to him, must be protected, no matter how unpleasant the assignment."

Dr. Samuel Perlman, Chairman of the Illinois Jewish War Veterans of the United States, although not citing the opinion by name, makes reference in his letter to *City of Chicago v. Lambert*, 47 Ill. App. 2d 151. Dr. Perlman suggests that the *Lambert* case is authority for you to arrest Nazis solely on the basis of their "storm trooper uniforms with swastika armbands." The *Lambert* case does not stand for this proposition.

In addition to wearing uniforms and armbands, the American Nazis in the *Lambert* case carried racially and religiously defamatory signs, distributed similarly defamatory literature, provoked two hundred citizens to gather and engage them in agitating conversation. These bystanders use vile language, trampled some of the signs, and approached the American Nazis with baseball bats, pipes and other similar such weapons. Only after all the above-described circumstances and incidents had occurred did the police take action in the *Lambert* case.

The Illinois Appellate Court, in examining the conviction of the American Nazis in the *Lambert* case, evaluated the foregoing evidence in this manner (pp. 160-161):

"The evidence in the instant case clearly established that the defendants intended to provoke, disturb and alarm the public in a manner that could create a breach of the peace. Their actions were highly unreasonable, unjustifiable and did, in fact, alarm and disturb spectators, provoking a breach of the peace."

Thus, the *Lambert* case is an example of a situation where the freedom of assembly may be restricted because of a "clear and present danger to the public safety." However, the situation under consideration (storm troopers wearing armbands) does not in and of itself constitute a clear and present danger. Just as in the *Rockwell* case, the situation under consideration lies within the constitutional protection of freedom of assembly.

For these reasons, it is our opinion that the police may not lawfully arrest and disburse Nazis solely on the basis of their uniforms and armbands. But, if, in the course of wearing these uniforms and armbands, the Nazis commit additional overt acts, such as the displaying of defamatory signs or other provocative acts, the police department is justified in arresting and disbursing them, in that these additional overt acts would present a clear and present danger to the safety of the community.

EFFECT OF MAKING ARREST RECORDS PUBLIC

(*Superintendent of Police—M. E. A.—August 9, 1965*)

Reference is made to your letter of July 27, 1965 in which you request our opinion as to whether "The release of information on past arrest records . . . will jeopardize . . . the position that identification records need not be destroyed or returned to the accused upon his acquittal." In your letter you cite the case of *Kolb v. O'Connor*, Ill. App. 2d 81 (1957). In the *Kolb* case, the Illinois Appellate Court uses this significant language (p. 88):

"The Court takes jurisdictional notice that the records of identification of the police department of the City of Chicago are not open to the general public."

Thus, the principle that the Police Department need not return these identification records is based in part, according to the *Kolb* case, on the fact that these identification records are not open to inspection by outsiders.

In a more recent case, *People v. Lewcrenz*, 42 Ill. App. 2d 410 (1963), the Illinois Appellate Court again affirmed the proposition "that the Criminal Court of Cook County has no jurisdiction to order the return of photographs, fingerprints and other means of identification" by the Chicago Police Department. The *Lewcrenz* case makes no reference to the earlier *Kolb* case, nor does it take judicial notice that identification records of the Chicago Police Department are not open to the general public. To the same effect is the

earlier case of *Maxwell v. O'Connor*, 1 Ill. App. 2d 124 (1954).

The *Kolb* case concerns identification records. It specifically designates photographs and fingerprints as identification records. It does not include arrest records in the category of identification records. It is our opinion that arrest records are not identification records as such.

The sole purpose of fingerprints and photographs is to identify a suspect. Although an arrest record may have some indicia of an identification record, it is primarily a recording of actions taken by the police. It would be impossible to record activities of a police department without compiling records of arrests made by that department and sister departments; whereas photographs and fingerprints are not necessarily required to document the activities of a particular police department.

Since we do not regard arrest records as identification records within the meaning of the *Kolb* decision, the fact that you afford information to the press as to past arrest records will not jeopardize your right to retain these arrest records.

However, whether it is in the best interest of the Chicago Police Department, the public, or the person or persons arrested, to furnish this information to the press is a policy question to be decided. But, as noted above, in our opinion there is no legal impediment in so doing.

For purposes of this opinion, we make no distinction between arrest records where the defendant was convicted and those where the defendant was not convicted.

ENTRAPMENT

(*Superintendent of Police—M. E. A. & S. R. D.—September 8, 1965*)

Reference is made to your letter of August 31, 1965, in which you request our opinion as to whether the following police procedure constitutes entrapment:

"One of our District Commanders has adopted the following method of enforcement: One of his plainclothes officers calls for a cab from a tavern, using the advertised telephone number. When the 'cab' comes, he gets in and directs the driver to take him to a predetermined location where another police officer is located. The second police officer then questions the 'passenger' in the presence of the 'cab driver' as to where he entered the cab, how much he was charged, etc., verifying the 'passenger's' statements with the 'cab driver.' The 'cab driver' is then arrested and charged with a violation of Sections 28-1-1 or 28-2 of the Municipal Code of Chicago or Sections 6-118 or 8-101 of Chapter 95½, Illinois Revised Statutes, whichever are appropriate."

It is our opinion that this procedure is not entrapment, within the meaning of the Illinois Criminal Code.

Section 7-12 of the Illinois Criminal Code (Ill. Rev. Stat. 1963, ch. 38, par. 7-12) provides that:

"A person is not guilty of an offense if his conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of such person. *However, this Section is inapplicable if a public officer or employee, or agent of either, merely affords to such person the opportunity or facility for committing an offense in furtherance of a criminal purpose which such person has originated.*" (Emphasis Added.)

Applying the principle set forth in Section 7-12, the courts have refused to allow the defense of entrapment in criminal trials where police personnel pose as prostitution patrons (*People v. Van Scoyk*, 20 Ill. 2d 232 (1960)), narcotics users (*People v. Brown*, 54 Ill. App. 2d 450 (1964)) and acceptors of bribes (*People v. Cash*, 26 Ill. 2d 595 (1963)), to name a few. On all these instances, the court concluded that the criminal design was in the mind of the defendant and that the police personnel merely acted as a conduit for the defendant to commit the offense. Thus, the police in these cases "merely afforded the defendant the opportunity to commit an offense in furtherance of a criminal purpose which the defendant originated".

The United States Court of Appeals for the 7th Circuit in *United States v. Saucedo*, 346 F. 2d 371 (7th Cir. 1965), most recently rephrased this principle in the following manner (p. 373): "Entrapment as a matter of law is established *only* where undisputed testimony makes it patently clear that an *otherwise innocent person* was induced to commit the act complained of by the trickery, persuasion or fraud of a government agent". (Emphasis added.)

In the instant situation, the criminal purpose originated with the cab driver. The plainclothes officer merely affords him the opportunity to commit an offense in furtherance of that criminal purpose. For these reasons, the procedures outlined by your District Commander would not constitute entrapment.

LIABILITY TO HOSPITAL FOR INJURED PERSONS

(*Superintendent of Police—C. F. V.—October 6, 1965*)

Your recent letter asks our opinion of the City's liability for payment of the hospital expenses of James Caparusso, who was brought to St. Mary of Nazareth Hospital for emergency treatment by a Chicago police officer who had fatally shot him during an arrest. That hospital had applied to the State Department of Public Aid for payment of its bill under pertinent public health legislation covering aid to the medically indigent. An auditor for the Public Aid Department denied the application stating, "responsibility for payment of bill lies with police department."

Be advised that, in our opinion, no contractual relationship is established between the City and a hospital when a police officer, pursuant to his duties, brings an injured person to a hospital for emergency treatment. State statute imposes the duty on a hospital to provide first aid or emergency treatment to persons seriously injured. Sect. 86, Ch. 111½, Ill. Rev. Stat., 1963.

Therefore, the request by the hospital for payment of its bill should be denied. I will write the Credit Manager of St. Mary of Nazareth Hospital directly informing him of our opinion and suggesting an alternative procedure to obtain payment.

AUTHORITY TO CONTRACT FOR TELECONOMY

(Director of Finance, Department of Police—M. M. M.—December 9, 1965)

Your letter of November 30, 1965 in which you request an opinion as to whether or not the Department of Police may legally enter into a contract with Teleconomy for review of past billings of the Telephone Company to the Police Department, has been referred to the writer for reply.

Briefly, the agreements call for reviewing past billings of the Police Department to ascertain whether or not the Department is entitled to refunds and, in the event that it is, Teleconomy to receive one-half of the refunds upon receipt of the same by the Department. The contracts contain certain alternate provisions, which are not pertinent to our opinion.

The services which Teleconomy proposes to provide are in the nature of an audit of past billings of the Telephone Company. Chapters 11-3 and 11-6 of the Municipal Code enumerate the powers of the Superintendent of Police and the Police Board, respectively. Neither section specifically grants the power to conduct audits. Chapter 7-20 of the Municipal Code provides that:

"The comptroller shall revise and audit all accounts in which the city is concerned either as debtor or as creditor."

This specific direction would necessarily include an audit of telephone billing and would exclude such audits by other departments which were not specifically enumerated in the powers granted to a department.

We would further point out that the Illinois Bell Telephone Company is operating under a Franchise which was passed by the City Council on July 20, 1931 and approved by the Mayor on July 30, 1931. Sections 8 and 9 of this Franchise provide certain free or discounted service to the City on the City Hall Private Branch Exchange, and that such excess not used on this Exchange should be credited against excess message units originating at other telephones furnished to the City. The City Hall Private Branch Exchange is used by numerous departments. Therefore, a review by one department, of telephone billings made by Illinois Bell to the City of Chicago, could not be readily accomplished.

We are, therefore, of the opinion that the Department of Police does not have the power to enter into a contract with Teleconomy for a review of past billings made by the Telephone Company to the Police Department. We base this opinion on the fact that the contract constitutes an audit, and the power to conduct audits is specifically delegated to the Comptroller for the City of Chicago.

Enclosed find the two proposed contracts attached to your communication.

POLICEMEN'S RIGHT TO UNIONIZE

(Alderman, 47th Ward—J. N. Z.—March 11, 1966)

We are in receipt of your letter dated February 16, 1965 in which you requested our views as to whether policemen may or may not join any "Labor Union".

A basic and comprehensive opinion on this subject was written April 25, 1964 by Carl Lundquist, Assistant Corporation Counsel. A copy of this opinion is attached as this also reflects the present opinion on this subject.

Since the latter opinion was written there have been several new cases relating to this subject matter. The leading case in Illinois on this question, as cited in the above opinion, is *People ex rel. Fursman v. the City of Chicago*, 278 Ill. 318, which held that the Board of Education of the City of Chicago has a right to employ as a teacher any qualified person it chooses and may adopt a rule forbidding the employment of any teachers who are members of or affiliated with trade unions, as neither the Constitution nor the statutes place any restriction on the power of the board in such respect. This case has been cited in several subsequent cases, including *Anderson v. Board of Education*, 396 Ill. 14; and *Acorn Auto Driving School v. Board of Education*, 27 Ill. 2d 93.

The latest case is *Board of Education of Community Unit School District No. 2 v. Doris Redding, et al.*, 32 Ill. 2d 567. In discussing the right to strike by governmental employees, the Court states (pp. 570-71):

"The trial court refused to enjoin either the strike or the picketing, and its order dismissing the complaint found that plaintiff had failed to show irreparable injury, that the picketing was peaceful and a valid exercise of the constitutional rights of free speech and that there was no danger of interference with the operations of the schools. And while there is some effort to divert us to a determination of whether public school employees may lawfully organize into unions at all (see: *People ex rel. Fursman v. City of Chicago*, 278 Ill. 318), that issue was not raised or passed upon below. Rather, the scope of our review is limited to a consideration of whether such employees may strike against their school board employer, and whether they may picket to support their strike.

"Although this is a case of first impression in a reviewing court of this jurisdiction it is so far as we can ascertain, the universal view that there is no inherent right in municipal employees to strike against their governmental employer, whether Federal, State, or a political subdivision thereof, and that a strike of municipal employees for any purpose is illegal." (Emphasis supplied.)

The Court went on to discuss the question of whether governmental employees have the absolute right to picket, and stated (pp. 574-75):

"Turning to the matter of picketing, which the trial court also refused to restrain, it is the position of defendants, and was apparently that of the trial court, that the right of working men to communicate their complaints by peaceful picketing is completely inviolable. That is to say, defendants insist that picketing is a form of free speech and when done in a peaceful and truthful manner may not otherwise be regulated or enjoined. However, the premise that peaceful picketing is immune from all regulation and control is a false one. While picketing has an ingredient of communication, the cases make it clear that it cannot be dogmatically equated with constitutionally protected freedom of speech, and that picketing is more than free speech because picket lines are designed to exert, and do exert, influences which produce actions and consequences different from other modes of communication. "... The picketing here, though peaceful, was for the purpose of fostering and supporting an unlawful strike against a governmental employer and being for an unlawful purpose, should have been enjoined for this reason alone. Apart from this, however, the effect of the influences exerted by the picketing was to impede and obstruct a vital and important governmental function—the proper and efficient education of our children—making its curtailment necessary to protect the patently over-riding public interest."

In the *Redding* case, the Supreme Court of Illinois now states that not only is there no inherent right to strike by governmental employees whose duties involve important governmental functions, but there is also no inherent right to picket, even if peaceful.

In summary, the Courts of Illinois hold that two essential rights of any labor union, the right to strike and the right of peaceful picketing, are not available to employees who are agents of state or local government.

Under the authority of *People ex rel. Fursman v. City of Chicago*, 278 Ill. 318 (1917) and *Board of Education v. Redding*, 32 Ill. 2d 567 (1965), it is our opinion that the City Council of the City of Chicago, the Police Board of the City of Chicago, and the Police Department of the City of Chicago all possess the power to prohibit police officers from becoming members of a labor union, or refrain from hiring police officers who may already be affiliated with a labor union.

Section C. BOARD OF HEALTH

PERSONS ELIGIBLE FOR TREATMENT

(Commissioner of Health—M. C. H.—September 5, 1961)

This is to acknowledge the receipt of your letter in which our opinion is sought as to whether or not the Chicago Board of Health is under legal obligations to screen persons presenting themselves for inoculations for the purpose of determining if they are Chicago residents.

Chapter 9-21, among other things, provides as follows:

“* * * Municipal contagious disease hospitals. A fee of twenty-five dollars per week shall be charged and collected from non-resident patients given hospital care at the municipal contagious disease hospitals, and from patients, residents of the city, willing to pay such fee. * * *”

“* * * Insolation hospital. A fee of twenty-five dollars per week shall be charged and collected from neighboring municipal and county authorities for smallpox cases cared for at the insolation hospital. * * *”

It is our opinion only as above provided are you required to give medical aid or assistance to any person who is not a resident of the City of Chicago. The Board of Health was organized for the benefit of the people living within the City limits of the City of Chicago, in that the citizens of Chicago alone who established the Board of Health are to reap the benefit of medical aid and assistance subject to reasonable rules and regulations promulgated by the Board of Health.

In answer to question three as to what type of identification should be required of persons to establish Chicago residency when applying for services rendered by the Chicago Board of Health, it is our suggestion that the person applying for medical aid and assistance should present a registration voter's card or in the absence of such voter's card a certification made by him giving the place and street number of his residence in the City of Chicago.

IMPOUNDING DOGS

*(Commanding Officer, Animal Shelter, Department of Police—R. N.
—October 13, 1961)*

You asked this department for an opinion as to whether the requirements of section 98-32 of the Code for payment of redemption and boarding fees for dogs taken up and impounded, applies in the case of dogs impounded for the purpose of observation for rabies.

Section 98-32, which you ask us to construe, states: "For every dog taken up and impounded *as provided in this chapter*, for which no license fee has been paid" there shall be paid a redemption fee and the cost of keeping such dog while in the pound at the rate of not to exceed twenty-five cents a day. Section 98-33 states: "When any licensed dog shall be taken up or impounded, the fees to be charged for the redemption of such dog shall be the same as prescribed in the preceding section." Dogs may be impounded under various sections of Chapter 98 for a number of reasons. The language of the two sections above referred to, which between them, covers the redemption procedure for both unlicensed and licensed dogs, is general in scope and covers "every dog taken up and impounded as provided in this chapter." The requirement for the payment of the fees set out in section 98-32 of the chapter is not restricted to redemption of dogs impounded for particular purposes. To reason otherwise would create an unrealistic situation: i.e., no fee would be required for holding a dog under observation for the required number of days—a fee would be required for holding a dog picked up as a stray or for any other reason. Surely there could be no such legislative intent to be read into the provisions.

For the above reasons we are of the opinion that the redemption of all dogs impounded under any section of Chapter 98 is covered by the fee requirements of section 98-32, and that no amendment of the Code is required.

ADVERTISING ON CARTONS

(Commissioner of Health—E. W. P.—August 19, 1963)

June 27, 1963, you wrote to the Corporation Counsel enclosing a copy of letter addressed to Dr. Eric Oldberg, President of the Board of Health, relating to the above subject and requested our opinion as to whether or not Ice Cream Mix and similar products came within the prohibition in the amendment of Sec. 51 of An Act in relation to Grade "A" Milk and Grade "A" Milk Products passed by the Legislature in 1961, which reads as follows:

"... however, no county, city, village or incorporated town shall require the carton or container label to show the date of processing, or a date before which such Grade 'A' products must be sold, or after which date such products may not be sold."

Sect. 130-23.1 of the Municipal Code provides that only Grade "A" pasteurized milk and milk products shall be used, and Sec. 139-8 provides that all milk and cream used for the manufacture of these products shall be pasteurized and comply in other respects with the standards for milk and cream as defined in the code.

It is our opinion that the prohibition in the legislation that Grade "A" products shall not be predated includes the Ice Cream Mix and similar products.

NURSING HOME REQUIREMENTS

(Commissioner of Health—B. Q. O.—December 18, 1963)

We acknowledge receipt of your letter of October 23, 1963, addressed to the Corporation Counsel of the City of Chicago, in which you request an opinion, pursuant to a motion presented at the meeting of the Nursing Home Hearing Board held on October 18, 1963, as to the validity of the claim of Mr. Leo Gold that he possesses the qualifications required for the position of manager in a Chicago nursing home, enclosing affidavits which Mr. Gold furnished in support of his claim.

You inform us that recently a great deal of additional evidence has been introduced before the Hearing Board, and for this reason they have requested that you obtain a new opinion from our office.

In accordance with your request, we have examined the transcripts of the testimony taken before the Hearing Board and the applicable statute, ordinance and decisions of the Illinois Courts.

The statute relating to nursing homes, Ill. Rev. Stat. 1961, Sec. 35.16, has the following definitions:

“‘Applicant’ means any person making application for a license . . . ‘Person’ means any individual, . . . corporation, . . . or any other entity whatsoever.”

Section 35.17 of the Act provides in part: “No person shall open, conduct, manage, or maintain a nursing home . . . without a license from the department . . .” Sec. 35.19 of the Act provides in part: “The department shall prescribe and publish minimum standards for ‘nursing homes’ . . . These standards shall relate to: . . . (b) number and qualifications of all personnel, including management and nursing personnel, having responsibility for any part of the care given to residents; . . .” Sec. 35.21 of the Act provides in part: “An application for a license may be denied for any of the following reasons: . . . (c) Personnel insufficient in number or unqualified by training or experience properly to care for the proposed number and type of residents . . .” Sec. 35.22 of the Act provides in part: “A license may be revoked, or a renewal thereof denied for any of the following reasons: . . . (d) violation of any provision of this Act or of the minimum standards, rules, regulations, or order of the Department promulgated thereunder; (e) any ground upon which an application for a license may be denied as prescribed in Sec. 6.” (Sec. 35.21).

Sec. 35.30 of the Act provides for Municipal licensing and regulation of homes as follows:

“Any city, village or incorporated town may, by ordinance, provide for the licensing and regulation of nursing homes, sheltered care homes, and homes for the aged, or any classification of such homes, as defined herein, within such municipality, provided that the ordinance require compliance with at least the minimum requirements established by the Department pursuant to Sections 4 and 11 of this Act. Such compliance shall be determined by the Department subject to review as provided in Section 13 of this Act. Section 13 shall also be applicable to the judicial review of final administrative decisions of the regulatory agency of the city, village or incorporated town. Any city, village or incorporated town which has or may have ordinances requiring the licensing and regulation of nursing homes, sheltered care homes, and homes for the aged, or any classification of such homes, with at least the minimum standards established by the Department pursuant to Sections 4 and 11 of this Act, shall make such periodic reports to the Department as the De-

partment deems necessary. This report shall include a list of those homes licensed by the municipality. Upon receipt of notice and proof from an applicant or licensee that he has received a license or renewal thereof from a municipality, accompanied by the required license or renewal fee, the Department shall issue a license or renewal license to such person. The Department shall not issue a license hereunder to any person who has failed to qualify for a municipal license. If the issuance of a license by the Department antedates regulatory action by a municipality, the municipality shall in like manner issue a local license unless the standards and requirements under the ordinance or resolution are greater than those prescribed under this Act. In such latter event, the license issued by the Department shall remain in effect pending reasonable opportunity provided by the municipality, which shall be not less than 60 days, for the licensee to comply with the local requirements. Upon notice by the municipality, or upon the Department's own determination that the licensee has failed to qualify for a local license, the Department shall cancel the license issued by it. The Department and the regulatory agency of the municipality shall at all reasonable times have the right to visit and inspect the premises and personnel of any home for the purpose of determining whether the applicant or licensee is in compliance with the requirements of this Act, or of the local ordinances which govern the regulation of the home. Cities, villages and incorporated towns may charge a reasonable license or renewal fee for the regulation of homes, which fees shall be in addition to the fees paid to Department hereunder."

Pursuant to the authority granted in said Act, the Illinois Department of Public Health promulgated "Minimum Standards, Rules, Regulations for Nursing Homes" which was revised December 1, 1962, effective February 1, 1963. On page 15 of said "Minimum Standards", in Division II—Administration, Sec. 1 c, the qualifications of an administrator are defined as follows: "c. The administrator of each home shall be a 4 year high school graduate or equivalent by the home's licensing date in 1965, or whenever a new administrator is appointed prior to that time."

In Section 7, on page 12, thereof appear the following definitions: "u. A '4 year high school graduate' is defined as a person who is a graduate of a 4 year high school recognized by the Illinois Superintendent of Public Instruction, a comparable agency in other states or accredited by a nationally recognized accrediting agency; or a person who has obtained a High School Equivalency Certificate, or a similar instrument issued under the regulations of the chief school officer in another state." "v. 'Equivalent of a 4 year high school graduate' is defined as passing the General Educational Development Examination administered under the auspices of the Illinois Superintendent of Public Instruction with a standard score of at least 35 on each of the five parts, or an average of at least 45 on all five parts. The test on the Illinois Constitution is not required by the Department."

Pursuant to the enabling Act, the City of Chicago passed an ordinance on July 9, 1958, Council Journal of Proceedings, page 8000, being Chapter 136 of the Municipal Code of Chicago. Sec. 136-3 provides in part: "Application for a license to conduct and operate a nursing home . . . shall be made in conformity with the general requirements of this code relating to applications for licenses. The application shall be under oath and shall contain (a) the name and address of the applicant if an individual . . . (c) the name of the person or persons under whose management or supervision the home will be conducted . . . (e) such information relating to the number, experience and training of the employees of the home, and of the moral character of the applicant and employees as the Chicago Board of Health may deem necessary."

The Hearing Board is provided for in Sec. 136-8, which provides in part: "Said Board shall pass on applications for licenses for nursing homes . . . which have been denied for any of the following reasons: A. Failure to meet the minimum standards prescribed in this chapter . . . C. Personnel insufficient in number or unqualified by training or experience to provide proper and adequate care for the number and type of residents . . ."

Sec. 136-9 provides in part: "A license may be revoked and a renewal thereof denied for any of the following reasons: . . . D. Violation of any provision of this ordinance or of the minimum standards, rules and regulations promulgated thereunder. E. Any ground upon which an application for a license may be denied as prescribed thereunder." Sec. 136-10 provides for hearing by the Hearing Board upon petition of an applicant whose petition for license has been denied.

Sec. 136-15 provides that nursing homes shall comply with rules and regulations set forth by the Board of Health and that the Board of Health may adopt and enforce rules and regulations relating to the operation and conduct of nursing homes.

The rule-making power of the Board of Health is defined in Sections 9-13 and 9-14 of the Municipal Code. Pursuant to such power and that conferred by the Nursing Act, Minimum Standards, Rules and Regulations Relative to Nursing Homes, under Chapter 136 of the Municipal Code, were duly adopted by the Board of Health.

Definition 1, Sec. B, paragraph 6, on page 3 of said "Minimum Standards" of the Board of Health provides as follows: "Equivalent of a high school graduate" is one who has received a satisfactory grade upon a general educational development test taken for purposes other than accreditation under the 'Illinois General Educational Development Testing Program.' A circular so entitled, being Circular Series A, No. 110, may be requested from the Office of the Superintendent of Public Instruction, Springfield, Illinois. The method of testing for purposes other than accreditation is set forth in Article IV on Page 8 of such circular. Notification that a person is interested in taking this examination may be given to the school in which the applicant takes the examination, which in Chicago, is the Chicago Board of Education—Parker High School, Room 320, 6800 South Stewart Avenue, Chicago 21, Illinois. Such a letter of authorization should contain a statement that the Chicago Board of Health shall receive a copy of the test results."

In our opinion the applicant, Mr. Leo Gold, is required under the afore-said statute, ordinance and Minimum Standards of the State Department of Health and Minimum Standards of the Board of Health to show compliance with the requirements stated necessary to an applicant for a license as manager of a nursing home, namely as quoted above in paragraphs "u" and "v" of Section 7 of the State Minimum Standards, and paragraph 6 of the Board of Health Minimum Standards. The presumption is that the statute, ordinance and rules are valid and the burden is upon a person objecting to their validity or applicability to show unreasonableness. Such burden has not been sustained on the record before us. There can be no question of the authority of the legislature to have set these educational requirements, there being no constitutional limitation upon its power to do so. Nor can there be a question of the power of the Board of Health to adopt Rule II B 6, which defines "the equivalent" to a "high school graduate" in terms which are not at variance with, but rather in detailed explanation of, the State requirement of "equivalent to a 4 year high school graduate" in Section 7, v.

The Chicago Nursing Home ordinance has already been held constitutional in *Father Basil's Lodge, Inc. v. City of Chicago*, 393 Ill. 238 (1946), which held the City did have power to pass an ordinance defining, regulating and licensing nursing homes. There it was held that the due process clauses do not limit the exercise of the State's police power unless the legislation is an arbitrary, unreasonable or improper use of such power. The *Father Basil* case was approved in *City of Chicago v. Heffron*, 346 Ill. App. 248 (1952), in which the reviewing court said (p. 256): "As we read the record, the evidence indicates that defendant was operating a home for the aged or infirm as defined in Sec. 136-1 of the Municipal Code of Chicago, and therefore the trial court should have held, as a matter of law, that she was operating a home for the aged or infirm without a license, as required by Sec. 136-2, and entered judgment in favor of the City notwithstanding the verdict. The ordinance provides for a minimum and maximum fine for each offense." These decisions are ap-

proved in *Unique Rest Haven, Inc. v. City of Chicago*, Ill. 25 App. 2d 419 (1960).

In our opinion, neither statute, ordinance or rules of the State or the Board of Health permit a discretion in the Hearing Board to dispense with the requirements of a high school education or the "equivalent thereof" as defined in the Rules, nor allow the discretion of accepting affidavits such as those presented at the hearing on behalf of Mr. Gold as an equivalent for the "equivalent" defined in the Rules.

A statute may vest general power in an administrative body like the board of health to grant or refuse licenses for the treatment of human ailments, so long as the board is required to adopt rules and regulations which are applicable to all and which tend to test the qualifications of applicants by taking an examination to secure a license.

People v. McGinley, 329 Ill. 173, 177 (1928)

People v. Hawkinson, 324 Ill. 285, 288 (1927)

People v. Witte, 315 Ill. 282, 292 (1925)

People v. Walder, 317 Ill. 524 (1925)

People ex rel Dyer v. Walsh, 346 Ill. 52, 56 (1931)
(4 years high school required).

An additional reason is that the Rules of the Board of Health have the force and effect of law. *People ex rel Barmor v. Robertson*, 302 Ill. 422 (1922). The cases hold that an administrative body, or hearing board, in applying such specific rules and regulations stating definite requirements, acts in a ministerial capacity, and may not exercise a discretion in dispensing with such specific requirements. Moreover, this is not a case where the applicant seeks to compel the issuance of a license improperly withheld from him because of the exaction of standards in excess of statutory requirements, or of a license refused him because of an arbitrary use of discretion. *Lesniak v. Dept. of Registration and Education*, 24 Ill. App. 2d 153, 156 (1960).

In addition, it has been held that an affidavit of a person not a party to the record cannot be read as evidence on the trial of a cause unless by consent; it is but the statement of a third party, and the fact that it is a part of the files in the case does not change its character nor make it competent evidence. *Quinn v. Rawson*, 5 Ill. App. 130 (1879).

Accordingly, we are of the opinion that it is within the province of the hearing board to determine whether or not an applicant meets the standards prescribed by Chapter 136 of the Municipal Code, the aforesaid Minimum Standards of the State and of the Board of Health but that it may not disregard the specific educational requirements thereof as to a high school education or the stated "equivalent" thereof and may not accept affidavits or testimony as to the applicant having alleged "equivalent" education, no such discretion being given to the Board.

In view of the above, it is our opinion that the application of Mr. Leo Gold for a license to operate a nursing home should be denied by the Board, for his failure to show compliance with the Minimum Standards of the State and of the Board of Health.

CHARGES AT CONTAGIOUS DISEASE HOSPITAL

(Commissioner of Health—M. C. H. & R. N.—August 3, 1964)

In considering the matter of charges by the municipal contagious disease hospitals to both resident and non-resident patients, as set out in section 9-21 of the Code, and the statements in your letter of July 30, 1964 as to the present inadequacy of the fee which was set by the city council many years ago when the cost of providing hospital services was far below present cost, we offer the following suggestions:

- (1) Under our present ordinance (9-21) no charge other than the \$25.00 fee set out may be made.
- (2) In our opinion there is no legal objection to adopting a provision which would require payment of an additional portion of the cost in cases where insurance carried by the patient covers such expense.
- (3) In our opinion there is no legal objection to adopting a provision increasing the fee commensurate with the increase in cost of providing the service regardless of insurance contribution.

We have prepared and transmit herewith draft of an ordinance revising section 9-21 in cases where the patient carries hospitalization insurance. If it is your desire to readjust the \$25.00 weekly fee in accordance with the increased cost of service we shall be glad to discuss the matter further with you.

LEGALITY OF PROPOSED INSPECTION FEES

(Commissioner of Health—R. S. C. & S. R. D.—March 30, 1965)

In your letter of February 18, 1965, you present the following question :

"Is there any provision in the Municipal Code, in the Illinois Revised Statutes or applicable federal laws or regulations which would prohibit the City of Chicago from collecting inspection fees based on volume of production from dairy farms holding Board of Health permits, or based on total receipts of inspected raw Grade A milk at receiving stations holding Board of Health permits when either the farm or milk receiving station may be located in Illinois or in Wisconsin, but under exclusive supervision of the Board of Health?"

Your letter and a conference with Jame Meany, Chief of the Dairy Inspection Division, revealed the following: The Board of Health of Chicago inspects most of the milk farms and milk plants in the milk shed. Without this inspection it would be impossible to trace substandard milk to its source in light of the enormous volume of milk sent into the City. Many of the plants and farms do not send their entire supply of dairy products to Chicago. On the contrary large quantities of milk and milk products are sent to communities located throughout the country. These communities allow the sale of milk from our milk shed within their borders because of the Chicago inspection permit. The City charges no permit fee and is not reimbursed for the costs of inspection.

The only revenue received by the City from the inspection and licensing program stems from the receipt of license fees charged to milk plants and milk distributing stations pursuant to Chapter 154 of the Municipal Code of Chicago. The present practice, as provided in Section 154-4, is to charge a fee to plant and stations located both within and without the corporate boundaries. Each of these facilities pay an annual plant license fee graded according to its size on the basis of ten dollars for each vehicle it operates within the City. In addition, a graduated fee is assessed for each vehicle based upon its tonnage. You state that the cost of the licensing and inspection program for 1964 was \$505,000 while revenue from license fees was only \$63,000.

Absent a specific grant of power by the State Legislature, and licensing power of a municipality is limited to its territorial boundaries. Municipalities may only exercise those powers which have been conferred upon them by the state. As far as the power of the City to protect the health of its citizens is concerned the Illinois Legislature has specifically provided that the "corporate authorities in all municipalities have jurisdiction in and over all places within

one half mile of the corporate limits for the purpose of enforcing health and quarantine ordinances and regulations." Section 7-4-1 of the Illinois Municipal Code (Ill. Rev. Stat. 1963, Chap. 24, Div. 4, par. 7-4-1 (Health and Quarantine Ordinances—Enforcement)). This provision would preclude the enforcement of a health ordinance beyond one half mile of the corporate limits.

Illinois case law substantiates this view. *Dean Milk Company v. City of Elgin*, 405 Ill. 204, 90 N. E. 2d 112 (1950), is a case directly in point. The City of Elgin attempted to enforce an ordinance requiring every person operating any milk plant, whether located within or without the City, and selling milk within the City, to pay an annual license and inspection fee based on the amount of milk received. The Court held the ordinance void as an attempt to exercise extra territorial jurisdiction, saying (page 207) :

"It was concluded that while cities possess the authority to regulate the sale of milk within their territorial limits, it does not follow that regulation of milk plants beyond their limits can be accomplished by permitting local sales for distribution only on condition that such regulations be complied with . . .

(Page 208) The effect is the same whether non resident milk plants are required to be licensed as such or whether the granting of a license to sell or distribute milk within the city is conditioned upon compliance with requirements prescribed for milk plants supplying such milk. We are of the opinion that the tenor of the ordinance here is such that it is an attempt to license and regulate a milk plant more than one half mile beyond the city limits of Elgin. The decisions in the Galesburg, Waukegan, and Aurora cases are controlling and the ordinance is void."

Cases also in point are *City of Rockford v. Hey*, 366 Ill. 526, 9 N. E. 2d 317 (1937) ; *Higgins v. Galesburg*, 401 Ill. 87, 81 N. E. 2d 520 (1948) ; *Dean Milk Company v. City of Aurora*, 404 Ill. 331, 88 N. E. 2d 827, 14 ALR 2d (1949) and *Dean Milk Company v. City of Waukegan*, 403 Ill. 597, 87 N. E. 2d 751 (1949). To the contrary see the Opinions of the Corporation Counsel, opinion 9954, Walter V. Schaefer, February 3, 1939.

In addition to the territorial limitation there is also the problem of whether the proposed licensing provision might not be looked upon as a revenue measure. The proposal in your letter would base fees on the "volume of production" or "total receipts of inspected raw Grade A milk."

In *City of Chicago Heights v. Public Service Corporation*, 408 Ill. 604, 97 N. E. 2d 807 (1951), the Court in holding unconstitutional an ordinance establishing license fees of Five Dollars per telephone pole erected, Two and One Half Cents per wire across each street, and Twenty Five Cents for each foot of gas main installed, said (page 608) :

"Since the authority to require license fees constitutes an exercise of the police power, it follows that the license fees charged must bear some reasonable relation to the additional burdens and necessary expense involved in the regulation and supervision of the business affected, otherwise the ordinance imposing the license fees will be regarded as a revenue measure and, being unauthorized, deemed null and void." There is, however, a presumption that a municipal ordinance is valid.

The Court in the same case also said (page 609) :

"A municipal ordinance is presumed valid and ordinarily, when challenged upon the theory that there is no reasonable relation between the license fee imposed and the cost of regulation, this contention must be both alleged and proved. A license fee may, however, be so grossly excessive as to be deemed arbitrary and unreasonable as a matter of law."

Whether the proposed fee would be struck down as a revenue measure would depend upon the challenger establishing that the ordinance is "arbitrary and unreasonable as a matter of law."

If the licensing provision is established to be a revenue measure it would also run afoul of the "commerce clause" of the Federal Constitution regardless of the power conferred by the state legislature, insofar as it was applied to farms and plants located outside the state. An article in the Illinois Law Forum, Kneier, "*Licensing Power by Local Governments in Illinois*," University of Illinois Law Forum, pages 1, 16 and 17 (1957), states:

"Interstate commerce may not be subject to the burden of local taxation; and if licensing is used to raise revenue it will be held to constitute an unconstitutional burden on interstate commerce." See *Standard Stock Food Corporation v. Wright*, 225 U. S. 540 (1912).

A licensing provision, which is not a revenue measure, when applied to out of state farms and plants would not be a violation of the "commerce clause." In *Dean Milk Company v. City of Madison*, 340 U. S. 349 (1951), the Court held unconstitutional an ordinance of the City of Madison which prohibited the sale within its territorial boundaries of milk which was not bottled and processed within a radius of five miles from the city, saying (page 354):

"In thus erecting an economic barrier protecting a major local industry against competition from without the state, Madison plainly discriminates against interstate commerce."

In reaching this decision the Court pointed out, however, that (page 355),

"If the City of Madison prefers to rely upon its own officials for inspection of distant milk sources, such inspection is readily open to it without hardship for it could charge the actual and reasonable cost of such inspection to the importing producers and processors."

This direction can be followed by legislation enabling municipalities to administer an inspection and licensing program within and without the State. Such legislation has been submitted to the General Assembly for passage.

When the enabling legislation has been enacted, we intend to submit an ordinance which will avoid imposing economic barriers but which will allow the City to "rely upon its own officials for inspection of distant milk sources."

NO CHARGE FOR THE TREATMENT OF ALCOHOLICS

(Chicago's Alcoholic Treatment Center—M. C. H.—January 5, 1966)

This to acknowledge receipt of your letter to this office in which inquiry was made:

- (1) Whether or not a facility operated by the City of Chicago can charge a fee for out-patient services?
- (2) Whether or not a treatment facility operated by the City of Chicago could collect payments from medical insurance policies from patients treated in an out-patient clinic.

Please be advised that we have examined Section 21-61 of the Municipal Code of Chicago which reads as follows:

21-61. "The commission shall establish a rehabilitation center in the city of Chicago having accommodations of rooms, laboratory and

other accessories necessary and pertinent to a thorough and advanced study of medical skill and knowledge toward effectuating a cure for alcoholism and the rehabilitation of alcoholics so that they may be restored to useful and gainful lives; the commission shall provide treatment for alcoholics including such hospital and social service as will aid it in accomplishing its purpose."

After a careful study of the above section, we were unable to find any authority given you, either expressly or by implication, to charge for services you render in your treatment center.

As we construe the ordinance above mentioned, we are of the opinion that the services rendered by your institution must continue without charge until the Illinois Municipal Code (Chapter 24 of the Illinois Revised Statutes) is amended to give you the authority to make a reasonable charge for such services. A proposed amendment is being drawn toward that end for presentation at the next legislative session.

We feel that our answer to inquiry Number 1, also answers inquiry Number 2.

Section D. MUNICIPAL TUBERCULOSIS SANITARIUM

LIABILITY INSURANCE

*(General Superintendent, Municipal Tuberculosis Sanitarium—
M. C. H.—October 5, 1961)*

This is to acknowledge the receipt of your letter to this office in which you ask our opinion whether or not it is necessary to carry out the provisions of House Bill No. 20 which adds Section 6.2 to an act relating to the care and treatment by counties of persons afflicted with tuberculosis. Said added section 6.2 provides as follows:

"The Board of Directors may insure against any loss or liability of the county, or of the tuberculosis sanitarium, or the branches, dispensaries or auxiliary institutions of such sanitarium, or of any employee, agent or officer of such sanitarium, resulting from a wrongful or negligent act of such employee, agent, or officer in the discharge of his duties within the scope of his employment."

Please note that the above section relates to treatment by counties of persons afflicted with tuberculosis, but does not include Municipal Tuberculosis Sanitariums. Therefore, in view of the foregoing, we are of the opinion that you are not required to carry such type of insurance.

BOARD'S SCOPE OF AUTHORITY

*(General Superintendent, Municipal Tuberculosis Sanitarium—
M. C. H.—February 13, 1962)*

This is to acknowledge the receipt of your letter to this office, in which you state that Professor Nicholas D. Cheronis of Brooklyn College wishes to move into the MTS and conduct a research laboratory "on new methods for the detection and estimation of Submicrogram quantities of organic compounds." Said letter seeks our opinion whether or not the Board of the Municipal Tuberculosis Sanitarium may before housing said research laboratory as a condition precedent, demand that the Professor employ his own personnel and assume all responsibilities in connection with said work as well as protect you from any and all liabilities in connection therewith.

We feel that tuberculosis is a public health hazard and that every effort on your part should be exerted to decrease and lessen such hazards, and further that the establishment of such research laboratory may be a step in the right direction.

The need for a cure of the tuberculosis disease becomes the quintessence of everything that embodies the search to find a cure which will hasten the recovery of those afflicted with such disease.

Chapter 24-29-7 under Additional Powers of Directors, provides as follows:

"* * * the board of directors may authorize to managing officer, superintendents, assistants and other employees and appointees to do such things as may be necessary or helpful in receiving, detaining and providing care and treatment for such persons * * *".

While it is true that the powers given the Board are limited to the *care and treatment* of the inmates of the institution, we think that housing a research laboratory in your institution must be considered as a legitimate exercise of the duties and responsibilities of the Board for the general welfare of the inmates.

In answering question two of your letter to this office whether or not a rental may be charged to cover your overhead, it is our opinion that the amount of rent for the area and the furnishing of light, heat, and power, is a matter for the Board to determine.

The Municipal Tuberculosis Sanitarium may protect itself from any liabilities by demanding from Professor Nicholas D. Cheronis, a liability policy to cover all damages to property and injuries to staff members, employees and to third persons who may have business with or visit the Municipal Tuberculosis Sanitarium.

We see no legal difficulties which the Board may encounter by housing the Professor and his research laboratory at the Municipal Tuberculosis Sanitarium.

TUBERCULOSIS SANITARIUM EMPLOYEE RETIREMENT AGE

(T. J. C.—G. F. M.—April 23, 1963)

In response to your request for an opinion concerning the setting up of retirement ages for employees of the Municipal Tuberculosis Sanitarium, the following is submitted.

Your letter states that you would like to know whether or not the Board of Directors of the Municipal Tuberculosis Sanitarium may act on their own for the retirement of employees in professional occupations, non-professional employees, and whether or not the physical condition of employees may be used as a basis for retirement.

As of this date, 684 of the employees of the Municipal Tuberculosis Sanitarium are Civil Service Employees and as such Civil Service Employees your Board of Directors has no power over their retirement regardless of the type of position that they may hold.

In order to set a retirement age for Civil Service Employees it would be necessary to secure legislation in order to provide a retirement age for such employees, and then all Civil Service Employees (except firemen and policemen, who already are covered by a compulsory retirement age) would be required to retire at that age.

If Civil Service Employees are in such physical condition that they are not able to perform duties to which they are assigned, charges may, of course, be filed against them and they may then be discharged by the Civil Service Board. The 409 employees in the Municipal Tuberculosis Sanitarium that are temporary appointees may, of course, be discharged at any time, by the action of the Board.

We are, therefore, of the opinion that the Board of Directors cannot act in the matter of retirement of employees except as concerns those employees who are temporary appointees, or by filing charges against those Civil Service Employees who are unable to perform their assigned duties.

LIABILITY OF MUNICIPAL TUBERCULOSIS SANITARIUM

*(General Superintendent, Municipal Tuberculosis Sanitarium—
R. E. N.—September 27, 1963)*

In reply to your letter of September 12, 1963 regarding Law Suits filed for damages occasioned by the negligence of a staff member or employee of the Municipal Tuberculosis Sanitarium in which a patient suffered injury or damages, we would like to advise you as follows:

1. Under the City Ordinances, in order for the Department of Law to defend staff members in suits of this nature it would be necessary to request the City Council for authorization to defend said employee sued. This we are willing to do.
2. In the event there is a judgment against a Doctor or employee for negligence within the scope of their duties, we would ask the City Council to authorize such payment.

3. We believe that the Municipal Tuberculosis Sanitarium should make inquiry into the costs of insurance premiums to cover such eventualities. We further believe that the Municipal Tuberculosis Sanitarium should carry insurance to cover such cases and that it should be included in their budget of 1964, if not prohibitive.

We point out to you that under *Chapter 34, Sub Section 5108.1* of the *Ill. Revised Statutes 1961* there is a special provision for the Board of Directors of such institutions to carry insurance. I have taken the liberty of quoting this section to you in the event you do not have the Statutes at the Institution.

"The Board of Directors may insure against any loss or liability of the county, or of the tuberculosis sanitarium, or the branches, dispensaries or auxiliary institutions of such sanitarium, or of any employee, agent or officer of such sanitarium, resulting from the wrongful or negligent act of such employee, agent or officer in the discharge of his duties within the scope of his employment.

Such insurance shall be carried in a company licensed to write such coverage in this state. Every policy of such insurance shall provide, or be endorsed to provide, that the company issuing such policy waives any right to refuse payment or to deny liability thereunder by reason of the non-liability of the insured county, tuberculosis sanitarium or the branches, dispensaries or other auxiliary institutions of such sanitarium for the wrongful or negligent acts of its employees, agents, and officers."

HOSPITAL EMERGENCY BILL ACT

*(General Superintendent, Municipal Tuberculosis Sanitarium—
M. C. H.—October 22, 1963)*

This is to acknowledge your letter to this office in which inquiry is made whether or not the Municipal Tuberculosis Sanitarium is subject to the Hospital Emergency Bill H-106 passed at the last legislative session which reads as follows:

"No hospital, either public or private where surgical operations are performed, operating in this State shall refuse to give emergency treatment or first aid to any applicant who applies for the same in case of injury or acute medical condition where the same is liable to cause death or severe injury or serious illness."

Section 11-29-1 of Chapter 24 of the Illinois Revised Statutes, 1961, provides as follows:

"1. The corporate authority of every city or village in the manner provided in this division 29 may establish and maintain a public sanitarium and branches, dispensaries and other auxiliary institutions connected therewith within or out of the corporate limits of the city or village, for the use and benefit of the inhabitants of the city or village for the treatment and care of persons afflicted with tuberculosis."

It appears from the above that the Municipal Tuberculosis Sanitarium is to be maintained for the purpose of providing a place to which a person may resort for medical treatment when afflicted with the illness of tuberculosis, and for no other purpose.

Chapter 11-29-7 further provides:

“* * * The Board of Directors may authorize the managing officer, superintendents, assistants, and other employees and appointees to do such things as may be necessary and helpful in receiving, detaining and providing care and treatment for such persons. * * *”

In view of the provisions above, it is our belief that the purpose of the sanitarium, its branches, dispensaries and personnel is solely for the treatment and care of tuberculosis, and no other illness. In conclusion, it is our opinion that the above quoted amended act does not embrace the Municipal Tuberculosis Sanitarium and you may therefore guide yourself accordingly. This is in conformity with a previous opinion rendered by this office dated July 24, 1951.

HIRING OF EMPLOYEES

*(General Superintendent, Municipal Tuberculosis Sanitarium—
M. C. H.—February 27, 1964)*

This is to acknowledge receipt of your letter to this office in which inquiry is made as to whether or not Dr. M. R. Lichtenstein, Medical Director, has the authority to rehire Dr. Salzman, a retired Municipal Tuberculosis Sanitarium Doctor, for the coming summer as an attending physician.

Chapter 24, Division 11-29-8, provides as follows:

“Every sanitarium established under this Division 29 shall be free for the benefit of the inhabitants of the city or village which established it, if they are afflicted with tuberculosis. They shall be entitled to occupancy, nursing, care, medicines and attendance according to the rules and regulations prescribed by the board of directors of the sanitarium.”

It is our opinion that Dr. Lichtenstein, with the approval of the Board, has the authority to hire any additional help, professional or otherwise, to furnish the necessary nursing, care and medicines as required by the provisions in Chapter 24 cited above.

CONSENT FOR SURGERY

(Medical Director—M. C. H.—February 2, 1965)

This is to acknowledge the receipt of your letter to this office, in which inquiry is made whether or not a married minor may give consent for surgery for his infants born out of said marriage; and further, whether an unwed minor mother may give the same consent for her infant.

Chapter 91 Sections 18.1 and 18.2 provide as follows:

“18.1 Legal effect.) § 1. The consent to the performance of a medical or surgical procedure by a physician licensed to practice medicine and surgery executed by a married person who is a minor, or by a pregnant woman who is a minor, shall not be voidable because of such minority, and, for such purpose, a married person who is a minor or a pregnant woman who is a minor shall be deemed to have the same legal capacity to act and shall have the same legal powers and obligations as has a person of legal age.

18.2 Surgery upon children—Consent by parents.) § 2. Any parent, including a parent who is a minor, may consent to the performance upon his or her child of a medical or surgical procedure by a physician licensed to practice medicine and surgery. The consent of a parent who is a minor shall not be voidable because of such minority, but, for such purpose, a parent who is a minor shall be deemed to have the same legal capacity to act and shall have the same powers and obligations as has a person of legal age."

In view of the provisions in said statute above mentioned we are of the opinion that both questions must be answered in the affirmative.

UNAUTHORIZED USE OF PRIVATE VEHICLES

*(General Superintendent, Municipal Tuberculosis Sanitarium—
E. W. P.—August 23, 1965)*

We have your recent letter in which you advise that your investigation has brought to your attention that a few Public Health Nurses have been using their personal vehicles without authorization to make field calls, which is violating the M. T. S. regulations. You enclosed copy of a directive on Transportation for MTS Public Health Nurses which specifically states that no other type of transportation is to be used during working periods while nurses are carrying out the performance of assigned home visits to patients, except by way of public transportation (CTA bus, elevated, subway, Illinois Central Suburban Service—within City limits).

You pose the question :

Is the M. T. S. liable for theft, fire, collision, public liability, personal liability, injury, property damage, and payment under the Workman's compensation Act should an accident occur while the Public Health Nurse is on duty and using her own car in violation of regulations?

Our answer to your inquiry is in the negative. The M. T. S. is not liable for any of these events for the reason that the nurse using her own car in violation of regulations is acting beyond the scope of her authority.

CLAIMING DECEASED PATIENTS

*(Staff Physician, Municipal Tuberculosis Sanitarium—M. C. H.—
November 1, 1966)*

Your recent letter addressed to Mr. Raymond F. Simon, Corporation Counsel of the City of Chicago, has been referred to the undersigned for response.

In your letter, you request a legal opinion outlining what procedure to follow in deciding which of two or more claimants is entitled to receive the body of a deceased patient at your institution.

In answer to your first question, as to the legal order of precedence among relatives claiming the body of a deceased patient, we find the following:

In the case of *Mensinger v. O'Hara et al.*, 189 Ill. App. 48, at pp. 53, 54, the Court stated, in part:

"The decided weight of authority in this country supports the proposition that while a dead body is not considered as property, in the ordinary, technical sense in which that word is usually employed, yet the law does recognize a right, somewhat akin, perhaps, to a property right, arising out of the duty of the nearest relatives of the deceased to bury their dead, which authorizes and requires them to take possession and control of the dead body for the purpose of giving it a decent burial. This right is an exclusive right to the custody and possession of the remains, and in the absence of any testamentary disposition, belongs to the surviving husband or wife, if any, or if there be none, then to the next of kin."

With respect to your second question, as to whether a common-law wife has any rights in such case, the Supreme Court of Illinois, in the case of *Peirce v. Peirce*, 379 Ill. 185, pp. 191, 192, stated:

"The cases of *Wilson v. Cook*, 256 Ill. 460, and *Stevens v. Stevens*, 304 Ill. 297, are cited for the proposition that a common law marriage is void in Illinois, even if performed in some other jurisdiction. The rule, however, is limited to the situation where the parties whose marriage is sought to be upheld in Illinois were, at the time of the marriage, domiciled in Illinois, although the marriage occurred in another State. * * * Where the parties are domiciled in another State at the time of contracting a common law marriage, valid in such State, such marriage will be considered valid here upon their removal to Illinois. *Young v. Young*, 213 Ill. App. 402; *Acklin v. Employees Benefit Ass'n*, 222 id. 369."

The answer, therefore, is dependent upon the facts of where the parties were domiciled at the time of contracting a common law marriage and whether said marriage was valid in that State. For example, if the parties were domiciled in Illinois where common law marriages are void, and said common law marriage took place in Illinois, it would not be recognized in the State of Illinois. If the parties were domiciled in Illinois and went to a State where such common law marriages were recognized for the purpose of consummating such a marriage, but the parties then returned to Illinois, said marriage would not be recognized in Illinois. Where, however, the parties are domiciled in a State where common law marriages are valid, and said marriage was consummated in that State, the marriage will be recognized in Illinois. If the parties are domiciled in another State where common law marriages are void, and such a marriage was consummated in that State, said marriage will not be recognized in the State of Illinois.

The foregoing explanation also answers your third question as to whether it makes any difference that the common law wife lived with the decedent in Illinois or in some other State, provided the common law marriage is one recognized in Illinois.

Section E. OTHER DEPARTMENTS AND OFFICERS

MICROFILMING RECORDS

(Purchasing Agent—A. F. G.—April 5, 1960)

Your letter of March 29, 1960 is as follows :

"The Department of Purchases, Contracts and Supplies, pursuant to Chapter 24, Section 22-A-10, has been maintaining and keeping on file, the original documents of Purchase Orders and Contracts for a period of ten years after execution. These records take up a great deal of valuable space.

The Law is not quite clear in our opinion, as to how long these records should be maintained before destruction. We would appreciate hearing from you the length of time that we are required to keep such documents, as intended by Law."

In Illinois, no City officer elected or appointed has authority to destroy public records, papers or documents except in the manner and to the extent provided by statute. The statute which authorizes City officers to destroy records is entitled, "An Act in relation to the reproduction on film of public records of counties, municipal corporations, political subdivisions and courts, and the destruction of the original records so reproduced" approved July 16, 1943, as amended. This Act consists of five sections and appears as Chapter 116, paragraphs 30 to 34.1 inclusive, Ill. Rev. Stats. 1959.

Section 1 of that Act provides that elected or appointed officers of any municipality may cause any or all public records, papers or documents in his custody or under his supervision to be photographed, microfilmed or otherwise reproduced on film.

Section 2 provides that any such reproduction shall be deemed to be an original record for all purposes, including introduction in evidence in all courts or administrative agencies; that a transcript, exemplification or certified copy thereof, shall be deemed to be a transcript, exemplification or certified copy of the original.

Section 3 provides that, "whenever such reproductions are placed in conveniently accessible files and provision is made for preserving, examining and using the same, any such officer may authorize or provide for the destruction of his original records, papers or documents which have been on file for ten years. Original records, papers or documents created prior to 1870 may not be destroyed * * *.

Section 4 of the Act provides the procedure to be followed and reads as follows:

"If any such officer or clerk of court, after causing any records, papers or documents to be photographed, microphotographed or reproduced on film, as provided in Section 1 hereof, desires to destroy the originals of such records, papers or documents not required to be kept under the provisions of Section 3, he shall file with the county board of his county or with the city council, board of trustees or other governing body of the municipal corporation or political subdivision, as the case may be, a statement signed by him listing the records, papers and documents that he has caused to be so photographed, microphotographed or otherwise reproduced on film and stating that he proposes to cause the originals of such records, papers and documents so listed to be destroyed.

A copy of such statement shall be posted, in a public place in the office of the county, city or village clerk, or in the office of the governing body of the municipal corporation or political subdivision, as the case may be, and in the office of the officer or clerk of court signing such statement. The county board, or the city council or board of trustees or other governing body of the municipal corporation or political subdivision, as the case may be, at any regular or special meeting held not less than 30 days after the filing and posting of such statement, shall consider said proposal and any objections thereto. Unless the county board, or the city council or board of trustees or other governing body of the municipal corporation or political subdivision, as the case may be, orders within 90 days of the filing and posting of such statement, that the originals of such records, papers and documents so listed, or any of them, shall be preserved. The officer or clerk of court signing such statement may, after such 90 day period, cause any of the originals of such records, papers and documents listed in the statement to be destroyed in accordance with the provisions of Section 3 hereof. Provided, that any records, papers or documents so ordered to be preserved shall not be destroyed unless included in a statement subsequently posted and filed in the same manner with the county board, or the city council or board of trustees, or other governing body of the municipal corporation or political subdivision, as the case may be, without any further order of preservation being entered within 90 days of the filing and posting of such subsequent statement."

If you follow the provisions of the foregoing Act you may destroy any of the records of your department which have been on file for ten years, except original records created prior to 1870, provided the city council authorizes their destruction as provided in section 4.

HOUSE OF CORRECTION TORT LIABILITY

(Superintendent, House of Correction—C. P. H. & H. W.—February 16, 1961)

We have your letter of February 7, 1961, wherein you state that the medical services at the House of Correction presently require contract and salaried physicians. You further state that with the opening of the new hospital building at your institution, the surgery department will be utilizing the services of about six surgeons, three assistant surgeons, two orthopedists and three anaesthesiologists. You claim that while most of these surgeons carry liability insurance, it is your understanding that this class of insurance is void whenever such physicians are performing salaried service in the hospital at the House of Correction. You point out that it is anticipated that all of the above medical personnel will serve on a contractual and not on a salaried basis.

You ask four questions in your letter in order for you to comprehend fully the liability of the City and the surgeons in this matter. We will answer the questions presented in the orders set forth in your letter.

You state "(a) If a surgeon carries liability insurance and his services here are contractual, would his company assume liability?"

Manifestly we cannot answer this question because we do not have before us for examination any of the insurance policies issued to the Doctors referred to in your letter. However, we have been informed by the American Medical Association that the two insurance carriers in this area which write the bulk of medical malpractice insurance are the Aetna Casualty and Surety Company and the St. Paul Mercury Indemnity Company. We contacted Aetna and were informed that they do issue malpractice policies to physicians and

surgeons and one of their underwriters stated that their standard form of malpractice policy contains a stock form of exclusion clause excluding only proprietors, superintendents and executive officers. Aetna's malpractice insurance policies do not exclude Doctors employed in public institutions such as yours.

In response to this question, it is our view that these Doctors should have their malpractice insurance contracts examined by their insurance brokers to ascertain whether they are covered while working at the House of Correction Hospital. If they are not covered by their present policies they should obtain insurance that will give them complete protection while working at your institution.

You also ask "(b) Are there any insurance companies in existence that handle liability insurance for institutions such as ours?"

The City of Chicago under the law is not liable for the torts of its employees acting in the exercise of governmental functions (9 I. L. P., Sec. 473). It has been repeatedly held that municipalities are not liable for acts to promote the public health and care of the sick and destitute (*Hanrahan v. City of Chicago*, 289 Ill. 400, 404; *Father Basils Lodge v. City of Chicago*, 393 Ill. 246; *Roumbos v. City of Chicago*, 332 Ill. 70, 82).

Likewise it has been well established that the maintenance and operation of the House of Correction of the City of Chicago, is the exercise of a governmental function and, thus, an inmate injured while working on the premises making bricks had no right of action against the City for his injuries (*Kelly v. City of Chicago*, 324 Ill. App. 382). In an earlier case it was held that it is a proper exercise of the police power of a City to erect and maintain a calaboose (jail) and that the City was not liable for the wrongful acts or negligence of its officers or employees in the management of the calaboose, or for the detention of a person therein having smallpox who spread the disease to persons living or working near the calaboose (*Evans v. City of Kankakee*, 231 Ill. 223). In a recent case the Court held a sheriff not liable for his failure to provide adequate and proper medical care and treatment to an inmate of a County jail (*Bush v. Babb*, 23 Ill. App. 2d 285).

We have shown here that the City is not liable for acts to promote the health of the public and for the maintenance of a jail. Since the City is not liable for such activities, our answer to your second question is that there is no necessity for it to carry liability insurance covering the hospital at the House of Correction.

You further ask "(c) Will the City have to assume the entire responsibility?"

The only class of City employees that have a statutory right to be indemnified by the City for judgments entered against them for torts arising out of their duties are policemen (Ill. Rev. Stats. 1959, 24 Par. 1-15.1). This right of indemnification does not extend to Doctors employed under contract or by salary at the House of Correction. Such employees are liable to third persons for their negligence (17 I. L. P. Secs. 256, 257 and cases cited therein. *Lasko v. Meier*, 394 Ill. 71, 77). The immunity of the City from liability does not extend to these Doctors (*Hering v. Hilton*, 12 Ill. 2d 559). Therefore, in answer to this question it is our opinion that the City is not liable to these Doctors or to third persons for injuries arising out of the negligent acts of the Doctors employed at the House of Correction. The Doctors alone would be liable for their torts.

You finally ask "(d) Would your department have any suggestions as to the cheapest and wisest solution regarding, inasmuch as possible, the City's safe interests?"

We have pointed out here that the City is not liable for the negligent acts of any of the Doctors referred to in your letter who are employed at the hospital at the House of Correction. The City is not under a legal duty to reimburse such Doctors for any judgments entered against them flowing from

their negligence. In answer to this question it is our opinion that it is unnecessary for the City to carry public liability insurance for this activity.

We have shown that such Doctors are personally liable to third persons for their negligence in connection with their duties at the House of Correction. It is our further opinion that it is necessary and proper for them to carry malpractice insurance that will protect them while performing duties on salary or on contract at the House of Correction. Such insurance is obtainable from the companies referred to herein or from other companies that write malpractice insurance.

CHICAGO LAND CLEARANCE COMMISSION

(Alderman, 12th Ward—M. C. H.—May 4, 1961)

This is to acknowledge the receipt of your letter to this office which an opinion is requested on the legality of the Chicago Land Clearance Commission to clear the property involved for the purpose of establishing a Chicago Branch of the University of Illinois in the Harrison-Halsted Area.

Please be advised that the Land Clearance Commission was appointed pursuant to the Blighted Area Redevelopment Act of 1947 as amended (Illinois Revised Statutes 1959, Chapter 67½, Section 63-91) and that said Commission exercises its authority pursuant to said statute. Its function generally is to acquire and clear slum and blighted areas, vacant or otherwise as defined in the statute, to clear such land for redevelopment by the installation of streets and utilities and sell and convey such land for redevelopment in accordance with an approved redevelopment plan.

There is no statutory limitation on the use for which a project area may be redeveloped. Section 19.1 of the Redevelopment Act provides that prior to making a sale or conveyance of any property, the Commission shall prepare and approve a redevelopment plan which shall also be approved by the State Housing Board and the governing body of the municipality.

Section 19 also requires that in order to assure that the property is used in accordance with the approved plan, the Commission shall require a purchaser to execute in writing such undertakings as the Commission shall deem necessary to obligate the purchaser to use the land for the purposes designated in the approved plan. The nature of the redevelopment plan and the use to which the land shall be put was left by the legislature to the discretion of the Commission. Accordingly, the Commission has sold land in accordance with the approved redevelopment plans to be developed for residential, commercial, industrial, educational and hospital uses. And its power to do so has never been called into question by any title insurance company, or denied by any Court.

It has been suggested that there is doubt about the power of a Commission to convey a substantial part of a project area to a public body, such as the University of Illinois, because the intent of the legislature was to provide for redevelopment by private enterprise. In support of this view there is cited a portion of the legislative finding and declaration in Section 2 of the Redevelopment Act, which reads as follows:

“... the eradication and elimination of such areas and the construction of redevelopment projects financed by private capital, with limited financial assistance from governmental bodies, in the manner provided in this Act, are hereby declared to be a public use essential to the public interest.”

However, the Illinois Supreme Court has repeatedly held that the public use which supports the right of eminent domain is the eradication and elim-

ination of slum, and once this public purpose is accomplished the manner in which the Commission disposes of the cleared area is immaterial. See *Zurn v. City of Chicago*, 389 Ill. 114; *Chicago Land Clearance Commission v. White*, 411 Ill. 310. Moreover, it is an elementary rule of statutory construction that a statute must be construed in its entirety, and in the absence of a legislative history the legislative intent can only be ascertained by reference to the words the legislature has used.

Section 19 of the Redevelopment Act provides that a Commission may transfer and sell the fee simple title to all or any part of the real property within the area of a redevelopment project

“(3) to any individual, association or corporation, organized under the laws of this State or of any other State or country, which may legally make such investment in this State . . .”

In addition Section 17 provides in relevant part as follows:

“the Commission . . . with the approval of the State Housing Board may convey to that municipality or to *any public body having jurisdiction over schools*, parks or playgrounds in the area in which the project is situated such parts of such real property for use for parks, playgrounds, *schools and other public purposes* as the Commission may determine, and at such price or prices as the Commission and the proper officials of such public bodies may agree upon;” (Italics supplied).

It thus seems abundantly clear that, aside from the broad language of Section 19, the Commission under Section 17 may in its discretion determine to sell any part of a project area to a public body for public purposes, subject only to the requisite approval of the sale and the redevelopment plan by the City Council and the State Housing Board.

In view of the above, it is our opinion that the Land Clearance Commission has the statutory authority to sell to the University of Illinois, the land in question and that said sale will be upheld in any Court of Record in the State of Illinois.

QUALIFICATIONS FOR OFFICERS

(*Department of Buildings, Assistant to Commission—E. W. P.—June 29, 1961*)

We have your letter of June 21, 1961, in which you advise that there is a vacancy in the Committee on Standards and Tests due to the death of Mr. Verne McClurg. This vacancy must be filled by a licensed structural engineer. You quote Sec. 41.1-1 of the Municipal Code “. . . shall have been a resident of the city for a period of one year preceding the date of appointment.”

You also cite Sec. 9-87 of Chap. 24 of the Cities and Villages Act, which reads as follows:

“Section 9-87. Qualifications for officers.

No person shall be eligible to any municipal office unless he is a qualified elector of the municipality and has resided therein at least one year next preceding his election or appointment. *However, these requirements shall not apply to the municipal engineer, health officers or other officers who require technical training or knowledge.* Nor shall these requirements apply to city attorneys in cities of 5000 or less inhabitants or to village attorneys in villages. But no person shall be eligible to any municipal office who is a defaulter to the municipality. As amended 1961, April 10, Laws 1961, p., H. B. No. 573. Section 1”. Emphasis added.

You request our opinion as to whether the italicized sentence would supersed the Municipal Code requirement of residency and thus allow the Mayor to appoint a non-resident of Chicago to the current vacancy, or whether or not the Mayor is bound by a specific provision in that he must appoint a resident structural engineer.

It is our opinion that the Statute governs. The word "shall" in the Statute is mandatory and over-all. The Mayor would, therefore, be authorized, according to this opinion, to appoint the structural engineer to this vacancy that in his judgment he deems best qualified for the position regardless of residence.

PAYMENT FOR ADDITIONAL PERSONAL SERVICES

(City Comptroller—J. G. D.—July 14, 1961)

We are in receipt of your letter of July 6, 1961, in which you state as follows:

"Chapter 7, Section 20.1 of the Municipal Code requires the Comptroller to report monthly to the City Council '. . . all payments on voucher, or otherwise than on payroll, to any person for personal services rendered to the city.'

We would appreciate your opinion as to whom should be listed on this report. Some persons are hired from time to time as Consultants, Architects, Attorney, Appraisers, Physicians, Social Workers, Engineers, etc. It is our belief that these people are individual contractors rather than employees, even though they perform personal services, and that the intent of the code is to provide the Council only with the names of employees paid on voucher rather than on regular payrolls."

The Executive Budget Act in municipalities over 500,000 (Chap. 24, Sec. 22-1, Ill. Rev. Stat. 1959) recites, in part, as follows:

"(1) Personal services: the reward or recompense made for personal services rendered for the city by an individual as an officer or employee of a municipality or an instrumentality thereof, or as an independent contractor, including any amount required to be deducted from the reward or recompense of any such person under the provisions of any retirement or tax law, or both.

(2) Contractual service: the expenditures incident to the completion of a project or the current conduct and operation of an office, department, board, commission or agency, including, but not limited to, postage and postal charges, surety bond premiums, title insurance, publications, office conveniences and services, exclusive of 'commodities' as herein defined, and including also expenditures for rental of property or equipment, repair or maintenance of property or equipment, utility services, professional or technical services, and transportation charges exclusive of 'travel' as herein defined."

In view of the above, it is our opinion that it is the duty of the City Comptroller to report monthly to the City Council all voucher payments for "personal services" which are not made under the authority of a written agreement between the City and the Contractor.

LEASING OF DOCKING FACILITIES

(Superintendent of Parking—J. C. M.—July 27, 1961)

In your letter of July 25, 1961, you advise that the Riverside Club, a restaurant and cocktail lounge located on the northeast bank of the Chicago River at Wells Street is desirous of leasing the 4 ft. abutment along the Chicago River for parking of watercraft for the summer only and are willing to pay rent on the basis of \$750 and cover all parties with insurance. You ask for an opinion as to whether you can legally lease out such abutment for the purpose mentioned.

There are no legal obstacles to entering into such lease provided that at no time shall any liquor be sold on this city property. We assume, of course, that the docking of watercraft will not interfere with the operation of traffic on the Chicago River so as to become a nuisance.

We have checked with Captain Jack Manley, Director of Ports of the city and he has no objection to such a lease.

SIGNATURES ON FIRE EXTINGUISHERS

(Division Marshal in Charge of Fire Prevention—E. W. P.—August 2, 1961)

We are enclosing herewith letter received from United Fire Equipment Service Association, 6154 Belmont Avenue, Chicago 34, Illinois, who attached copy of the Ordinance relating to installation, maintenance, etc. of standard fire extinguishers. This company requests a ruling on what constitutes a signature as worded in the Code, Section 90-22.1, which requires tags to be attached to the fire extinguishers showing the date of inspection and recharging, the signature of the person performing the work and the license number of the serviceman.

We do not furnish opinions to any other than the Mayor of the City of Chicago, the Heads of various Departments, and the City Council. However, they propound the question as to whether or not a signature may be an exact facsimile of the real signature by means of a rubber stamp, or whether it requires a written signature by the person performing the service. This is an important subject and we, therefore, are directing this answer to you, and you may transmit a copy of this letter to United Fire Equipment Service Association if you so desire.

There is a Uniform Facsimile Signature of public officials Act contained in Chapter 102 of the Statute, Sec. 102.61, which authorizes an officer, after filing with the Secretary of State his manual signature certified by him under oath, to execute or cause to be executed with a facsimile signature in lieu of his manual signature. This, of course, does not apply to others other than public officers under the Statute.

We realize, however, that it may be very impractical and sometimes unreadable for the real signature to appear on all of these tags. We suggest that should these servicemen wish to file with you his manual signature certified by him under oath and affirm that it will have the same legal effect as the manual signature that he may then use the facsimile on the tags. You are further protected to this extent because of the requirement for the license number of the said serviceman and the other provisions in the Code as to the color, etc.

PROCEDURE FOR TRANSFER OF LAND

(Commissioner, Community Conservation Board—M. C. H.—August 15, 1961)

This is to acknowledge receipt of your letter to this office in which you ask our opinion as to whether the parcels of land designated in the Hyde Park-Kenwood Urban Renewal Plan as approved by the Chicago City Council on November 7, 1958, to be sold to the following named redevelopers for the following named disposition parcels:

Parcel Number	Designated Redeveloper
PK 1-7	Chicago Park District
S 1-4	Board of Education
HR-4	Chicago Dwellings Association
1-1	St. Thomas Apostle Church and School
1-2	St. Paul's Episcopal Church
1-3	Hyde Park Department, Young Men's Christian Association
1-4	George Williams College
1-5	Chicago College of Osteopathy and Osteopathic Hospital
1-6	Jewish Children's Bureau
1-7	The Church Home for Aged Persons
1-8	Chicago Police Department and Ward Office
1-9	Chicago Municipal Parking Authority
1-10	United Church of Hyde Park
1-11	Art and Cultural Center
1-12	First Baptist Church
1-13	Chicago Fire Department
1-14	Augustana Lutheran Church
1-16	Chicago Child Care Society

must be sold pursuant to publication under the Urban Community Conservation Act (Ill. Rev. Stat., Ch. 67½, Section 91.13, par. 6), or in view of the fact that said designation of parcels has had the approval of the City Council and of the Housing and Home Finance Agency of the Federal Government, may those parcels be sold by negotiation and without published notice.

Section 91.13, par. 6, provides in part as follows:

"* * * the Conservation Board shall by public notice by publication once each week for two consecutive weeks in a newspaper having general circulation in the municipality prior to the execution of any contract to sell, lease or otherwise transfer real property and prior to the delivery of any instrument of conveyance with respect thereto, invite proposals from and make available all pertinent information to redevelopers or any person interested in undertaking to redevelop or rehabilitate a Conservation Area, or any part thereof, * * *."

Said paragraph 6 further provides in part as follows:

"* * * the Conservation Board may negotiate with any persons for proposals for the purchase, lease or other transfer of any real property acquired pursuant to this Act and shall consider all redevelopment and rehabilitation proposals submitted to it and the financial and legal ability of the persons making such proposals to carry them out. The Conservation Board, as agent for the Municipality, at a public meeting, notice of which shall have been published in a newspaper of general circulation within the municipality at least fifteen but not more than thirty days prior to such meeting, may accept such proposals as it deems to be in the public interest and in furtherance of the purposes of this Act; provided that, all sales or leases or real property shall be made at not less than fair use value * * *." (Italics supplied.)

In view of the above, we are of the opinion that the Conservation Board may negotiate without publication notice for the sale of the above mentioned parcels of land to the above designated redevelopers, except as indicated in the next paragraph of this letter, for the reason that the redevelopers, with the exceptions noted, are engaged in nonprofit institutional use, being nonprofit, educational, charitable, hospital, church, or other eleemosynary institutions, and by reason of the commitments made to them under the Hyde Park-Kenwood Urban Renewal Plan, and the approval of said commitments under said plan by the City Council and the Housing and Home Finance Agency of the Federal Government. In addition, we feel that these institutions perform a public service and that thus facilitating the sale of these parcels to them may be deemed in the best public interest.

However, it is our opinion that the Chicago Dwellings Association and Art and Cultural Center may not be classed among the redevelopers to whom definite commitments have been made under the plan, but that the reference to them in the plan may at the most be construed as a mere recommendation, not a commitment. Any sale to either of them, in our opinion, must be preceded by publication notice as provided in Section 91.13, par. 6 of the Act.

Our opinion is further asked in said letter to this office whether or not it is necessary for the Conservation Board to hold an open meeting to accept the proposals of the above designated redevelopers as provided in Section 91.13, par. 6 of the Act. It is our opinion that the acceptance of said proposals of the designated redevelopers must be at an open meeting held pursuant to notice as provided in said paragraph above quoted.

RECEIVING PRISONERS AT HOUSE OF CORRECTION

(Bailiff, The Municipal Court of Chicago—E. W. P.—November 21, 1961)

We have your letter of November 14, 1961, in which you write as follows:

"We are confronted with a problem pertaining to the transportation of prisoners from the courts to the House of Correction and the County Jail, whereby our patrols arrive at the above mentioned institutions quite late that is such time as 5:30 P. M. to 7:30 P. M. due to the court calls being tried in late afternoon.

"When the patrols arrive late, they are told by the Superintendent of the House of Correction that they will have to be in by 4:30 P. M. and this creates a constant discrepancy between employees which is no fault of ours.

"Will ask that you kindly give us an opinion as to whether there is any provision in the City Code as to what time the House of Correction and the County Jail have a right to refuse prisoners."

Section 24-2 of the Code provides that the board of inspectors provided for by statute and appointed in accordance therewith shall have control of the house of correction and shall have the right to make all proper rules and regulations for the purpose of carrying out the provisions of this chapter; and Section 24-3 provides that the superintendent of the house of correction shall have the custody, rule, charge, and keeping of the house of correction, and all persons committed thereto, under the supervision and direction of the board of inspectors, and he shall enforce such order and discipline therein as shall be provided by the board.

Section 24-5 provides :

"It shall be the duty of said superintendent to receive into the house of correction such persons as may be committed thereto by any court or magistrate in the county authorized to commit prisoners to such house of correction by the laws of the state or by any ordinance of the city, or any town or village in the county having a contract with the city for the care of its prisoners, and to put each of such persons so committed as are able to labor to the work which they are respectively best able to do, not to exceed eight hours for each working day. . . ."

Section 24-6 provides :

"It shall be the duty of all members of the police force of the city delivering any person to the house of correction to deliver to the superintendent the mittimus or execution by virtue of which said person was committed, and to return immediately to the comptroller a duplicate thereof."

It is our opinion that Section 24-5 is controlling. We believe that it is the duty of the superintendent to receive the prisoners at all times. The rules and regulations referred to in Sections 24-2 and 24-3 do not in our opinion afford any right on the part of the inspectors or the superintendent to set any limited times for the acceptance of prisoners. The ordinance contemplates expedition of the delivery of the person and return of the mittimus or execution.

DESTRUCTION OF RECORDS

(Records Consultants—A. F. G.—May 4, 1962)

Your letter of April 19, 1962 is as follows :

"There is now in process of installation a uniform system of timekeeping and payroll procedures for all agencies of the City of Chicago. We have suggested destruction after three years of certain of the records that will be produced under these procedures and would appreciate your opinion as to whether such destruction would be legally permissible.

The system being installed provides for three basic categories of records as follows :

1. *Daily Time Reports.* These are the records we believe to be of transitory value. They consist of a daily recording of the time worked by each employee on either an individual sheet for each such employee or group sheet for several employees with each sheet to be signed by the individual employee and approved by his supervisor, or in specified cases to be prepared and signed by a foreman or other supervisor and approved by a higher level supervisor.
2. *Time Rolls.* These are semi-monthly records prepared for each payroll group by a timekeeper on the basis of the Daily Time Reports. They show the time for each day for each employee. These records are to be signed by the timekeeper and a supervisory employee.
3. *Payroll Registers.* These are the official payroll documents, prepared in conformity with the Time Roll, and signed by the department head.

It is here assumed that the original Time Rolls and the original Payroll Registers will be retained permanently, or for a long period of years.

With reference to the Daily Time Reports, the volume of records makes it administratively desirable to retain them no longer than may be essential for useful purposes. For example, an inspection unit of 100 inspectors would

generate some 25,000 of these records a year and safe storage will quickly become a major problem, involving substantial cost. We have, therefore, suggested a rule as follows:

"The daily time reports required by this Chapter shall be retained for a minimum period of three years. At the beginning of each new year, the daily time reports for the fourth year preceding shall be destroyed, leaving three complete years in the files, with the following exceptions:

- "a. If, in any case the Department of Law, the Civil Service Commission, or the Comptroller's Office requests the department to retain the records of any employee, the records so requested shall be extracted from the regular files and retained until such time as they are released for destruction by the agency requesting their retention.
- "b. Records of time on work for which there is to be reimbursement from state or federal funds shall be retained until the records are audited, or for a period of five years in the absence of such an audit."

In addition to your opinion as to whether the application of this rule would be contrary to any legal requirements for the retention of records, we would appreciate having your views as to whether this would handicap the Department of Law in any way in the performance of its functions."

An Act of the General Assembly which provided the method and procedure for the destruction by county and municipal officials of public records which had been on file in their offices for ten years was repealed at the recent session of the General Assembly. In its stead a new statute was enacted entitled "Local Records Act". The new Act does not set out the procedure for the destruction of county and municipal records, but provides for the creation of a "Local Record Commission," which for Cook County and Chicago consists of the president of the county board of Cook County, the Mayor of Chicago, the States Attorney of Cook County, the County Comptroller of Cook County, the State Archivist (who is secretary of State) and the State Historian. The President of the County Board is to be chairman of the Commission.

By section 7 of the new Act, the Local Records Commission has been given the following powers.

"Section 7. Except as otherwise provided by law, no public record shall be disposed of by any officer or agency unless the written approval of the appropriate Local Records Commission is first obtained.

The Commission shall issue regulations which shall be binding on all such officers. Such regulations shall establish procedures for compiling and submitting to the Commission lists and schedules of public records proposed for disposal; procedures for the physical destruction or other disposition of such public records; and standards for the reproduction of such public records by photography or microphotographic processes. Such standards shall relate to the quality of the film to be used, preparation of the public records for filming, proper identification matter on such records so that an individual document or series of documents can be located on the film with reasonable facility, and that the copies contain all significant record detail, to the end that the copies will be adequate."

The Commission has met not nor issued the regulations provided in section 7 above quoted. We have advised several departments that until the Commission meets, organizes and formulates regulations as provided in said section 7 no municipal officer shall destroy public records in his office.

We have written the Chairman of the Commission urging the early organization of the Commission. When this has been done, we suggest you submit the proposals contained in your letter, to the Commission for the purpose of securing its approval for the suggested plan.

CIVIL DEFENSE CORPS

(Chicago Civil Defense Corps—H. S.—August 1, 1962)

This is to acknowledge receipt of your letter of July 27, 1962, relative to the above subject in which you requested that authority be granted to yourself and the Assistant Director of the Chicago Civil Defense Corps, to execute agreements with various owners or agents of buildings in the City of Chicago for fallout shelters and facilities therefor, a copy of which proposed agreement you enclosed.

Section 2, of Chapter 196A, relative to Local Civil Defense Organization, provides as follows:

"The director and co-director of the local civil defense organization shall have direct responsibility for the organization, administration, training, and operation of the organization, under the direction and control of the mayor and subject to the Illinois Civil Defense Act of 1951, as amended (Amend. Coun. J. 10-10-57, p. 6092.)"

We are of the opinion, from reading legislation pertaining to the Chicago Civil Defense Corps, that an ordinance is required to grant the authority which you request. We therefore have prepared an amendment to the Local Civil Defense Organization, appearing in the Municipal Code of Chicago as Chapter 196A, which gives general authority to the Director and Assistant Director of the Chicago Civil Defense Corps to execute such agreements without further council action, and forward the amending ordinance with our approval indicated thereon for introduction to the Council for passage.

We suggest, however, that in the event new forms of agreements are furnished which provide for financial obligations on the part of the city, then a new ordinance would be required to authorize such agreements.

DESTRUCTION OF RECORDS

(City Comptroller—A. F. G.—September 18, 1962)

We have your letter of September 4, 1962 re Destruction of old records, which reads as follows:

"The Comptroller has old City warrants for collection, vouchers covering payments, cancelled checks, paid contracts and other documents stored in the warehouse at 31st and Sacramento Streets. We desire to destroy all of those dated 1940 and prior.

"In the past we have been cremating these records. However, if we shred them, a scrap paper dealer will purchase them and pay for the hauling, resulting in revenue to the City at present scrap paper prices. If we cremate them in the City incinerator, we must pay hauling costs and get nothing in the way of revenue.

"Can we legally sell these old papers as scrap paper after shredding them and, if so, do you know of any reason why they should not be sold instead of burned."

On April 27, 1962, we sent a letter to the president of the Cook County Board of Commissioners on this subject; copy of which is hereto attached. On May 11, 1962 we received a letter from Edmund J. Brennan, Director of Central Services of Cook County which read as follows:

"We are in receipt of your communication of April 27th last, directed to the Honorable John J. Duffy, who has designated the undersigned to act in his behalf in pursuant of the statutory provisions identified as the Local Records Act.

"We appreciate your directing our attention to the pertinent statutory references. It is reasonable to anticipate appropriate action in the near future and we will be pleased to advise further at that time."

When we received your letter we contacted Mr. Brennan to ascertain what progress had been made in the matter. He advised us that the work was progressing and expected the organization work be completed in about 30 days.

In view of the provision in section 7 of the Local Record Commission Act which prohibits any officer or agency from destroying public records unless the written consent of the Local Records Commissioner is first obtained, we advise you not to destroy any public records until the Commission is organized and its written approval of your plan of destroying records is first obtained.

Unless the regulations of the Commissioner provide for a specific method of destruction, we are of the opinion that you may use the method suggested in your letter.

SPRINKLING SYSTEM AT SCHOOLS

*(Division Marshal in Charge of Bureau of Fire Prevention—E. W. P.
—October 3, 1962)*

We have your letter dated July 6, 1962 in which you direct our attention to Section 64-1.2 of the Municipal Code of Chicago relating to fire prevention. This section has to do in part with the installation of sprinkler systems in school buildings.

You advise that there are approximately 12 school buildings that, from a structural standpoint, require a sprinkler installation. However, you advise that those in charge of the schools maintain that they conduct religious classes only and consequently should not be included in said ordinance. The schools teach Yiddish and/or the Hebrew language besides the religious instructions and the buildings range from three classrooms—fifteen students—to sixteen classrooms—two hundred and seven students.

The particular section reads as follows:

"Automatic sprinkler systems complying with the requirements of Chapter 91 shall be installed on or before January 1, 1960 in every existing pre-ordinance building and buildings hereafter erected, two stories or more in height, used in whole or in part as Type I school, or used in whole as Type II school, and hospitals, infirmaries, nursing homes, nurseries, orphanages, sheltered care homes, sanatoria and homes for the aged, as defined in Section 48-3 of the Code as Class B Institutional Units, and each of construction Type III-A, III-B, III-C, IV-A, IV-B. Such installation shall include basement areas."

Subsequently there were two amendments to this section; the last one extending the time for the installation of the automatic sprinkler systems to July 1, 1962. Section 1-19 of the Municipal Code provides that all general provisions, terms, phrases, and expressions contained in the Code shall be liberally construed in order that the true intent and meaning of the City Council may be fully realized. The true intent and meaning of the City Council in enacting Section 64-1.2(h) together with Section 64-1 was to afford the most adequate protection possible for the children in the schools designated in the pertinent type of construction regardless of what subjects are taught in the school.

You state in your letter that the occupancy for the school children varies from fifteen students in three classrooms to two hundred and seven students in sixteen classrooms. Section 64-3(b) pertaining to the installation of fire alarm boxes indicates in its language that the requirement in that section pertains to Type I schools with 100 or more occupants and to Type II schools where the entire area is comprised of a school. While we have indicated in this letter that the protection of a sprinkler system should be provided regardless of the subjects taught, it is our opinion that consideration should be given to the number of students in the instances that you relate. We believe that the criterion as indicated in Section 64-3(b) should be followed for religious schools, i.e., . . . that the sprinkler system should be provided in the religious schools where there are 100 or more occupants.

AUTHORITY OVER DRAINLAYER'S FEES

(Deputy Commissioner of Sewers—W. M. Z.—December 14, 1952)

With reference to your inquiry as to permit fees may I call to your attention our Opinion No. 11477 of February 15, 1952 which reads as follows:

"In your letter of January 11, 1951 you call attention to greatly increased fees being charged by the department of public works, bureau of sewers for permits, inspection and drainlayers licenses, these advances being as much as forty to fifty per cent, as indicated by letter of November 1, 1951 from the bureau to plumbing contractors."

"You want to know by what authority the bureau arbitrarily increases its fees for permits, inspection and drainlayers licenses. You ask if any ordinance has been passed giving this authority. You question the validity of such an ordinance if it were passed."

"You ask our opinion whether the bureau of sewers has the legal right to impose exorbitant fees and whether an ordinance authorizing these charges would be valid."

"The bureau advises us that section 31-2 of the Municipal Code of Chicago is their authority for the increase in permit and inspection fees which went into effect January 1, 1952. They admit the increase in the license fee for drainlayers was not justified by the said section or any other provision of the code. At the time this increase was made section 119-3 of the code fixed the annual license fee for drainlayers at thirty-five dollars. On January 16, 1952, C. J. p. 1785, this section was amended, making the fee for such license fifty dollars and is now in effect."

"Section 31-2 reads as follows:

'No sewers or drains shall be laid in any public way and no connection shall be made with any public sewer or drain without the written permission of commissioner of public works; nor shall any person drain from any point within the limits of the city into the Chicago river or any of its branches, or into any slip connecting therewith, or into any canal or canals constructed under the authority of said city, without first obtaining a permit for such drainage from the commissioner of public works; and said commissioner is hereby authorized to grant such permits and to exact a permit fee therefor to be fixed by said commissioner, which said permit fee shall be equal to an amount sufficient to defray the expense imposed upon the city in consequence of granting such permission. The said permit fee, however, shall not be less than ten dollars for each connection.'

'Any person violating the provisions of this section or any regulation pertaining thereto prescribed by said commissioner, shall be fined not

less than fifty dollars for each offense and a further fine of twenty-five dollars for each and every day such violation shall continue."

"By this section the commissioner of public works has been authorized by the corporate authorities, to fix the amount of the permit fees for sewers, at an amount equivalent to an amount sufficient to defray the expense imposed upon the City as a result of granting such permits."

"The department advises us that the cost to the City of making sewer inspection has been greatly in excess of the revenue from the permit and inspection fees heretofore in effect. They say the increase in permit and inspection fees is just about sufficient to meet the mounting costs of inspection service furnished by the City."

"While it is true that statutes and ordinances which grant to ministerial officers discretionary power without any standard, rule or regulation to restrain the unrestricted exercise of such discretion have been held invalid, *Welton v. Hamilton*, 344 Ill. 82, we are of the opinion the section here in question does not violate such rule."

"Here the ordinance fixes a definite standard to guide the commissioner of public works in determining the amount of permit fees, namely an amount commensurate with the cost of inspection services imposed on the City by reason of the issuance of such permits."

"Unless it can be shown that the fees fixed by the commissioner are unreasonably in excess of such costs, we are of the opinion the section cannot successfully be attached."

AIR POLLUTION INSPECTIONS

(Director, Department of Air Pollution Control—B. Q. O'B.—June 25, 1963)

This is to acknowledge receipt of your letter to this office requesting our formal opinion with respect to developing an Annual Inspection Program, the first step being an Emission Survey (plan attached to your request), a proposal prepared jointly by the Department of Air Pollution Control and the U. S. Public Health Service, which outlines a survey to be made of some 10,000 industrial processes in the City of Chicago to determine the air pollution potential of their operations. You say that the first step involves seeking necessary information from those who will be subject to the Air Pollution Control Ordinance and Rules and Regulations, which would be sought by the mailing of a questionnaire in the form of an Application for Certificate of Operation for Process Equipment (a form of which is attached to your request).

Your first question relates to the legality of using the Ordinance in the following manner to implement the survey:

"1. Applying Section 17-60 to all existing process equipment in lieu of equipment installed since May 1, 1959, the date when the Ordinance became effective."

This question means can Section 17-60 be construed to have a retroactive or retrospective application to all existing, pre-ordinance buildings, structures and equipment? To answer such question, a close examination of the Ordinance is necessary to determine the intention of the City Council. We are of the opinion that such an examination shows the intention of the City Council that any and all sources of atmospheric pollution, as defined in the Ordinance, are subject to its provisions as to compliance with respect to emission limits and as to inspection, as required by Section 17-60, and that existing, pre-ordinance buildings, structures and equipment are subject to such provisions. The definitions in Section 17-2 and particularly subparagraphs (2.9),

(2.19), (2.21), (2.37), (2.38), (2.46), (2.47), (2.48), (2.52), (2.56), (2.58), (2.62), (2.64), (2.66), (2.70), (2.72), (2.73), (2.74), (2.75), (2.82), (2.86) and (2.88), serve to indicate such intention.

Such intention is further borne out by the following Sections of the Ordinance: 17-13(2), (3), (4), (5), (6), (7), (9), (11), (13), (14) and (15), 17-23, 17-24, 17-26, 17-27, 17-28, 17-29, 17-36, 17-41, 17-43, 17-44, 17-48, 17-49, 17-60, 17-61, 17-62, 17-71, 17-72, 17-74, 17-75, 17-76, 17-78, 17-79, 17-80 and 17-81.

We are, however, not unmindful of the adjudicated cases which announce the following principles: A municipal corporation possesses no inherent power, but its existence and powers are derived from the legislature, and in order to legislate it must be able to point out the statute which gives it the power to do so. Since municipal corporations exercise delegated and limited powers only, no presumptions can be indulged in as to the validity of their acts. When questioned, and the power is not clear, the right to pass a particular ordinance must be established by the city. *City of Chicago v. Gunning System*, 114 Ill. App. 377, affirmed 214 Ill. 628 (1904). The legislative powers of municipal corporations are strictly construed, and if there is any fair and reasonable doubt as to the existence of a power, the doubt must be resolved against the municipality claiming the right to exercise it and the power be held not to exist. *City of Chicago v. Ross*, 257 Ill. 76 (1912); *City of Marquette Heights v. Vrell*, 22 Ill. App. 2d 254 (1959); *Houston v. Village of Maywood*, 11 Ill. App. 2d 433 (1956); *City of Chicago v. Mandel Bros.*, 264 Ill. 206 (1914); *City of Chicago v. P. F. Pettibone & Co.*, 267 Ill. 573 (1915); and *City of Ottawa v. Brown*, 372 Ill. 468 (1938).

The presumption is that a statute or ordinance is intended to operate prospectively only, and it will be construed to have retroactive operation only where the language employed is so clear that it will admit of no other construction, and any doubt is resolved against retroactivity, and in favor of prospectivity only. *McQueency v. Catholic Bishop of Chicago*, 21 Ill. App. 2d 553, 557 (1959); *City of Chicago v. L. J. Sheridan and Co.*, 18 Ill. App. 2d 57, 76 (1958); *Masonic Fraternity Temple Ass'n. v. City of Chicago*, 131 Ill. App. 1, 27 (1907); *Abbate Bros., Inc. v. City of Chicago*, 11 Ill. 2d 337, 343, 344 (1957), and cases there cited.

The City of Chicago has statutory power "to declare and define nuisances and abate the same". Ill. Rev. Stats., Ch. 24, Sec. 21-20, and Ch. 24, Sec. 11-60-2. Such power is now amplified by the Air Contamination Control Act of May 29, 1961, Laws 1961, p. 576, August 25, 1961, Laws of 1961, p. 3880, Ill. Rev. Stats. Ch. 24, Sec. 11-19-11.

In our opinion, the present Chicago Air Pollution Control Ordinance is validly enacted and constitutional. Previous Chicago smoke ordinances have been held valid. *Harmon v. City of Chicago*, 110 Ill. 400 (1884); *City of Chicago v. Dunham Towing & Wrecking Co.*, 161 Ill. App. 307 (1911); *City of Chicago v. Dunham Towing & Wrecking Co.*, 175 Ill. App. 549 (1912); *Glucose Refining Co. v. City of Chicago*, 138 Fed. 209 (Cir. Court, N. D. Ill. 1905).

In order to avoid the possibility of an attack on the Ordinance, which might prove difficult, or even successful, in the light of the above cited cases, we are of the opinion that any and all ambiguity on the subject of retroactivity should be forestalled by amending the Ordinance.

Accordingly, we submit herewith a suggested amendment for your consideration.

Question No. 2 of your letter, relating to requiring the various manufacturing establishments to supply information on their manufacturing processes and equipment as a prerequisite to the issuance of a Certificate of Operation, is provided for by appropriate provisions in the suggested amendment.

Question No. 3 of your letter relates to using Sections 17-79, 17-80 and 17-81 to implement legal action to obtain return of application forms from manufacturing establishments. It has been held that an ordinance requiring

an applicant for a license of a horse-drawn vehicle shall give his name and address and the number and description of the vehicle kept by him and "such other information as may be prescribed" was not objectionable as leaving to the discretion of an unnamed person what other information may be required, as the city council is the only authority having power to prescribe what information shall be required, and the character of such information must be prescribed by ordinance. *Robbins v. City of Herrin*, 293 Ill. 133, 139 (1920). The suggested amendment seeks to clear up any ambiguity as to requiring such information. Moreover, it creates a clear duty with respect to the furnishing of such information, and creates a liability for fines or penalties under the named Sections.

Any other sections of the Ordinance which we feel are applicable to your program are covered by the suggested amendment.

Be It Ordained by the City Council of the City of Chicago :

Section 1. Chapter 17 of the Municipal Code of Chicago is amended as follows :

17-23. Adding at the end of such paragraph, as now amended, the following :

"Every existing, pre-ordinance building, structure, or part thereof, premises, fuel-burning, combustion or process equipment or device, as defined in this Chapter, and any other existing or pre-ordinance subject or object covered by this Chapter, and any person as defined in this Chapter, shall comply with all applicable requirements of this Chapter, it being the legislative intent that the provisions of this Chapter shall be retroactive, when applicable, and therefore retrospectively enforceable against every such existing category."

17-49. Adding at the end of such paragraph, as now amended, the following :

"The director may require of any person, as defined in this Chapter, with respect to every existing, pre-ordinance building, structure, or part thereof, premises, fuel-burning, combustion or process equipment or device, as defined in this Chapter, and any other existing or pre-ordinance subject or object covered by this Chapter, the furnishing of plans, or specifications, drawings, surveys, or any other reasonable information, in the judgment of the director, with respect to the nature of any such existing or pre-ordinance subject or object, including but not limited to, the data specified in any section of this Chapter, including Sections 17-48 and 17-49, and the director may require such additional data as he deems necessary for the purpose of determining the air pollution potential of their operations and of issuing any certificate of operation or allowable fuel certificate, pursuant to the provisions of Sections 17-60, 17-61 and 17-62 of this Chapter."

17-60. Adding at the end of such paragraph, as now amended, the following :

"The provisions of this section are applicable to every existing, pre-ordinance building, structure, or part thereof, premises, fuel-burning, combustion or process equipment or device, as defined in this Chapter, and any other existing, pre-ordinance subject or object covered by this Chapter and any person as defined in this Chapter."

"The director is authorized to deny or delay issuance of any certificate of operation or allowable fuel certificate, if and when any person required to supply any information or data required by any section of this Chapter, including information or data with respect to existing, pre-ordinance building, structure or part thereof, premises, fuel-burning, combustion, or process equipment or device or heating plant, other than domestic, until such information or data is furnished."

Section 2. This Ordinance shall become effective upon its passage and due publication.

DISCLOSURE OF RECORDS

(Department of Buildings—E. W. P.—September 6, 1963)

We have your letter of July 11, 1963, in which you request our opinion as to the action which should be taken by your department in the matter of public disclosure of records. You enclosed two copies of specific requests by an attorney, which are typical examples of approximately a dozen requests made by the same attorney, that you open to him your files and that he be furnished with a copy of all permits or other identification relating to certain property, the dates of any and all building inspections and the record case numbers and dispositions of court proceedings relative to same.

In our opinion, to which you refer, dated March 1, 1960, is the following paragraph which we believe is pertinent to example which you quote :

“Neither under the common law, the statutes or under the ordinance referred to above is any duty imposed on your board to permit the records of your office to be copied by persons desiring the information out of curiosity or for use in their personal business affairs. However, public officials in this city have always extended this courtesy to persons desiring information concerning the records in their offices subject to such reasonable regulations that they may determine are necessary to avoid interference with the orderly conduct of their offices.”

It is our opinion that the repeated requests for information on several properties are not reasonable. The attorney is consuming considerable valuable time on the part of the Building Department. He does not furnish any power of attorney, as you state in your letter, when it is a matter of litigation where the records are important he should serve you with a subpoena duces tecum.

HOUSE OF CORRECTION PERSONNEL CARRYING FIREARMS

(Correctional Officers Association—B. M. K.—September 19, 1963)

Your letter of September 12, 1963 to Mr. Arthur J. Ward, Superintendent of the House of Correction in which you request an opinion concerning state statutes covering firearm provisions has been referred to me for answer.

The rules and regulations of the House of Correction forbid the carrying of any firearms by any personnel of the House of Correction, except under special circumstances and with specific approval of the Superintendent of the House of Correction. We feel that these provisions are within the discretion and authority of the Superintendent of the House of Correction, and that the statute is not in conflict with these rules and regulations. The statute (Ch. 38 Sec. 24-2) is permissive and not mandatory and therefore does not require that security personnel at the House of Correction carry firearms.

INDEMNIFICATION OF POLICEMEN

(Corporation Counsel, Dearborn, Michigan—S. R. D.—April 7, 1964)

Your letter of April 3, 1964 relative to the case of *Monroe v. Pape* has been referred to the undersigned.

After the decision of the United States Supreme Court, the case went to trial and resulted in judgments against the defendants totaling approximately \$12,000. In subsequent motions the trial judge reduced these judgments to approximately \$8,500, which were paid by the City of Chicago.

Section 1-4-5 of the Municipal Code of Chicago, 1961 (Ill. Rev. Stat., 1963 ch. 24, par. 1-4-5), provides that the municipality shall indemnify the policeman for any judgment recovered against him for acts in the performance of his duties as a policeman.

Section 6-2(d), setting forth the duties of the corporation counsel of the city of Chicago, provides in part as follows:

"* * * that when a judgment is rendered against any member of the police department for injury to person or property resulting from the performance of his duties as a policeman, he [corporation counsel] shall certify such judgment to the city comptroller for payment by the city, when, in his opinion, such member of the police department has not been guilty of wilfull misconduct and the corporation counsel is of the opinion that an appeal is not justified."

You might be interested in reading the case of *Bernice Wise v. City of Chicago and John C. Melaniphy*, 308 F. 2d 364, Petition for Writ of Certiorari denied March 18, 1963, October Term, 1962 No. 770, where the court held that the City of Chicago and its Corporation Counsel could not be held liable under the Civil Rights Act.

We do not have a copy of our brief in the *Pape* case to forward to you.

PRISONERS' RIGHTS IN RELATION TO NEGOTIABLE INSTRUMENTS

(Superintendent, House of Correction—J. C. M.—September 23, 1964)

In your letter of September 18, 1964, you advise that prisoners receive money order, paychecks and other negotiable instruments, which are to be credited to their accounts, which entitles them to make commissary purchases. Under the present practice, you advise that the inmate is requested to endorse these money orders and checks and they are deposited in the Lawndale National Bank, Inmates Fund, with the proceeds credited to the inmate's account.

You now suggest in your letter that this procedure be changed so that the checks and money orders may be deposited in said bank to the credit of said Fund but without the endorsements of the inmates. You request an opinion as to whether this procedure may be followed.

Each negotiable instrument, under the law, in order to transfer title requires an endorsement of the payee or his duly authorized agent. There is nothing in the statutes that clothes you with the authority of an agent in

handling the funds of the inmate. This question has not been posed to this office prior to this so that we have made an examination of the Opinions of the Attorney General. In the Opinions of 1915, Page 364, the Attorney General holds:

"A person charged with crime and confined in prison is entitled to receive his mail, subject, however, to reasonable prison regulations.

Such regulations may not authorize an officer to open mail against the objections of the prisoner.

An officer having a prisoner in custody may require such prisoner to open mail in his presence, as a condition upon which the same is delivered. This is in order to prevent smuggling instruments of escape or other unlawful matters to such prisoner."

We are of the opinion that there may be a question of liability not only on your part as Superintendent of the House of Correction, but also on the part of the bank receiving checks and money orders not properly endorsed by the payee. It seems to us that the inmate should be given an opportunity to know that he has received a check or money order and that he be allowed to endorse the check or money order of his own free will.

We are, therefore, of the opinion that your present method of procedure is the proper method to be followed and that to change this method to one that you suggest would be illegal.

PORT AUTHORITY JURISDICTION OVER ABUTTING PREMISES

(Owner of Premises—B. W.—December 10, 1964)

Replying to your letter of November 20, 1964, regarding the alleged damage to your property located at 4953 N. Bernard Street, Chicago, Illinois caused by erosion from the north branch of the Chicago River please be advised as follows:

The Port Authority of the City of Chicago promptly on receipt of your complaint assigned two (2) members of their staff to make an investigation. Their investigation disclosed that there is need for repair of a retaining wall because of deterioration due to longevity. However, since the wall is adjacent to and runs parallel to the property owned by you at 4953 N. Bernard Street, Chicago, Illinois, the responsibility is upon the owner of said property to make the necessary repairs. This is in accordance with the Municipal Code of the City of Chicago, Chapter 38, Section 34 which provides as follows:

Every owner of premises abutting on the Harbor (the harbor shall consist of the Chicago River and its branches as defined in Chapter 38, Section 1) shall at all times keep and maintain in a state of good repair and in a safe condition all wharves, docks, piers, seawalls, riverbank retaining walls, etc. or other similar structures on or appurtenant to such premises. Every violation of this section shall constitute a separate and distinct offense for every day such violation shall continue. The Port Director shall notify in writing such owners of any violation of this section and direct him to restore or repair such structure within a reasonable time.

Section 35 of said chapter 38 provides for the obtaining of a permit from the port director accompanied by a sketch or plat showing the work to be done, among other provisions there is a requirement of fees to be paid for the issuance of said permit.

At the request of the Department of the Port of Chicago we are therefore notifying you that in not keeping your property in a safe and good condition there is a violation of chapter 38, section 34 of the Municipal Code of Chicago and that you are hereby requested to make such repairs as may be necessary.

We realize that the undertaking of these necessary repairs during the winter months would be somewhat more expensive than when weather conditions are more favorable and in accordance with the recommendation of John J. Manley, Port Director of the City of Chicago the necessary repairs be completed by June 1, 1965.

FIRE DEPARTMENT DESTRUCTION OF RECORDS

(Purchasing Agent—R. S. C. & S. R. D.—June 30, 1965)

In your letter of June 7, 1965, you relate that there is a "definite shortage of storage space in several warehouses and storerooms throughout the city." You refer in particular to two vaults at the Fire Department's General Storeroom at 3150 S. Sacramento Avenue, which contains "records belonging to the Water Collection Division of the Department of Water and Sewers showing Assessed Water Rates which date back to 1934." You say "if these two vaults could be relieved of these old records, approximately 2500 square feet of additional space will become available for the storage of important Fire Department Repair Shop parts." To this end you request an opinion "as to the time limit for the retainment of these records, and when we may take action to dispose of them for the reasons stated above."

Section 10 of the Local Records Act, Ill. Rev. Stat. 1963, ch. 116, par. 43.110, provides:

"The presiding judge of any court or the head of each agency or both shall submit to the appropriate Commission in accordance with the regulations of the Commission, lists or schedules of public records . . . that are not needed in the transaction of current business and that do not have sufficient administrative, legal or fiscal value to warrant their further preservation. The presiding judge of any court or . . . the head of each agency shall also submit lists or schedules proposing the length of time each records series warrants retention for administrative, legal or fiscal purposes after it has been received by the agency. The Commission shall determine what public records have no administrative, legal, research or historical value and should be destroyed or otherwise disposed of and shall authorize destruction or other disposal thereof. No public record shall be destroyed or otherwise disposed of by any Local Records Commission on its own initiative, nor contrary to law."

Under the circumstances you present, the Head of the Department of Water and Sewers should submit to the Local Records Commission, "lists or schedules of public records . . . that are not needed in the transaction of public business and that do not have sufficient administrative, legal or fiscal value to warrant their further preservation." The Commission will then determine whether the records stored in the two vaults at the Fire Department's General Storeroom "have no administrative, legal, research or historical value and should be destroyed or otherwise disposed of."

In order to facilitate this procedure, and to learn with particularity the regulations to be complied with, you should contact Edmund J. Brennan, Chairman, Director, Cook County Department of Central Services, Room 1012, County Building, Chicago.

PLANNED DEVELOPMENT DEFINED

(Commissioner, Department of Urban Renewal—E. W. P.—July 23, 1965)

We acknowledge your letter of July 14, 1965, requesting our opinion as to whether a tract of land which you specify within the Hyde Park-Kenwood Urban Renewal Project may be designated as a Planned Development under the provisions of the Chicago Zoning Ordinance.

You advise in the second paragraph of your letter that the area in question, shown on the map that you enclosed, contains a total of 163,908 square feet, or 3.76 acres. The definition of Planned Development under Article 3 of the Ordinance provides as follows:

"... A 'Planned Development' shall be at least four acres in area, except for planned developments operated by a municipal corporation, or a hospital as defined by law, which shall be at least two acres in area, manufacturing planned developments which shall be at least 10 acres in area, and air rights planned developments which shall not require any minimum area (Amend. Coun. J. 6-15-62, p. 7322)."

The subject area of 3.76 acres would not qualify under this definition unless we considered the entire development as being operated by a municipal corporation.

One of the parcels, contained in sub-paragraph (3), identified on the map as I-9, the existing City parking facility No. 44 and the area to be added to the facility, is operated by a municipal corporation. The other two parcels, indicated in sub-paragraph (1) Parcel C-12, sold to Harper Court Foundation, Inc. in accordance with the Urban Renewal Plan for a commercial center for artisans, craftsmen, and other small businesses, and sub-paragraph (2) Parcel C-9, consisting of land acquired and cleared by your Department which you advised will in the future offer for sale for private development of a service station, cannot be considered as municipal operations. However, both of these parcels, C-12 and C-9, are and will be subject to redevelopment agreements obligating the buyers to use the land in accordance with the provisions of the Urban Renewal Plan, said agreements to remain in effect until November 6, 1998. Article 3 of the Ordinance, as pointed out in our opinion of August 20, 1963, copy of which you attached to your letter, also contains the provision:

"... A Planned Development is a tract of land which is developed as a unit under single ownership or control, or which is under single designated control by a common ownership at the time it is certified as a Planned Development. . . ."

The questions therefore which we must resolve are two-fold: (1) whether the entire tract of land as shown on the map that you attached is being developed as a unit under single ownership or control or under single designated control by a common ownership, and (2) being less than four acres, can the tract of land qualify as a planned development?

It is our opinion, as to the first inquiry, that the area in question is under single control by the City of Chicago through the Department of Urban Renewal by virtue of part ownership and the existing agreements and those to follow. Parcel I-9, the parking facility of the City, would be embraced in the plan at the time of the approval of the City Council. Parcels C-12 and C-9 would be obligated to use the land in accordance with the provisions of the Urban Renewal Plan under the redevelopment agreements as stated in your letter, and to assure your control of the Planned Development it is our opinion that you should obtain further agreement from Harper Court Foundation, Inc.,

its successors and assigns, to act for them in your application for the Planned Development.

It is our further opinion that technically we cannot consider the entire Planned Development as operated by a municipal corporation. It may be, and in fact it appears from the map, that there are other areas which could be included to expand the entire tract to four acres. You need only .24 acres to obtain this result. However, the difference is so small, comparatively, that it is our opinion that the Department of Development and Planning in their analysis of the plan would have jurisdiction under Section 11.4-1 to consider your whole plan in substantial compliance with the requirements under Sections 3 and 11 of the Chicago Zoning Ordinance. We suggest that you consult Hon. John G. Duba, Commissioner, with reference to this phase of your proposed application. It is our further opinion that on the execution of the proposed agreement from Harper Court Foundation, Inc., you should proceed as the sole applicant in accordance with the Ordinance.

CORPORATION COUNSEL'S ACTIVITY IN CIVIL SERVICE HEARING

(Secretary, Civil Service Commission—E. W. P.—August 31, 1965)

We acknowledge receipt of your letter of July 26, 1965, in which you advise that the Civil Service Commission requests that the Corporation Counsel inform them why the Commission does not have the authority to assign an Attorney from the Corporation Counsel to represent the Civil Service employee before the Commission.

We realize that for a long period of time it was the practice to assign an Attorney from this office to represent the employee. However, after very careful reflection we have concluded that this practice should not continue. A brief resume of the entire procedure explains our present position.

The charges against the Civil Service employee are prepared by the Corporation Counsel's Office on the basis of the evidence submitted by the respective Department Head. Under the provisions of Chap. 6 of the Municipal Code of Chicago, the Corporation Counsel must perform the duty to appear for and protect the rights and interests of the City in all actions and proceedings brought by or against it or any City officer, board, or department, including actions for damages when brought against such officer in his official capacity. The City is also charged with the duty of appearing for and defending any member, officer or employee for the Board of Health, Police Department or Fire Department, who is sued personally for damages claimed in consequence of any act or omission or neglect of his official duties or in consequence of any act under color of authority or in consequence of any alleged negligence while engaged in the performance of such duties.

None of these duties cited in the Code grant any authority to the Corporation Counsel to appear for and protect the right and interest of any employee or City officer where the City itself is the body that is prosecuting the charges. The Corporation Counsel in this instance has the duty of prosecuting the charges against the employee or officer to a successful conclusion when possible. The Corporation Counsel, therefore, cannot at the same time engage in conflict of interest by also representing the employee charged with the offense. This is not fair to the City or to the employees and has no sanction either in the statute or the code.

GARBAGE COLLECTION IN MULTIPLE DWELLINGS

(Commissioner, Department of Streets and Sanitation—A. H.—December 21, 1965)

We are in receipt of your letter of November 12, 1965, addressed to Mr. Raymond F. Simon, Corporation Counsel of the City of Chicago, in which you ask for an opinion as to whether the City of Chicago has any responsibility in providing refuse collection service for "condominium" type of dwellings, wherein the living units in multiple dwellings are individually owned and, in most cases, individually heated. You enclosed a copy of previous correspondence of this office under date of September 15, 1960, written in response to your Department's previous request of May 18, 1960, relating to other types of multiple dwelling units and the City's responsibility to provide refuse collection service therefor.

As you know, Section 99-18 of the Municipal Code of Chicago contains the provisions which are applicable to refuse collection service which will be provided by the City of Chicago with respect to multiple dwelling units, which is, in part, as follows:

"Except in the case of a multiple dwelling containing less than five living units, a multiple dwelling producing less than thirty-two gallons of refuse per week, or a multiple dwelling each living unit of which is individually heated by the tenant, it shall be the duty of the owner of every multiple dwelling to cause to be removed at his own cost and expense at least once each week all refuse produced therein."

Upon consideration of the foregoing language, it is the opinion of this Department that the City Council never intended to exempt the owners of condominium dwelling units contained in multiple dwelling buildings from the responsibility of removing all refuse produced in said units. For the purpose of eliminating any possible misunderstanding, however, a proposed amendment to Section 99-18 of the Municipal Code, making such legislative intention clearer, is herewith enclosed for your consideration. We are also returning the previous correspondence exchanged between your Department and the Law Department, which you had forwarded to us.

BUILDING JURISDICTION

(Division Marshal in Charge, Bureau of Fire Prevention—M. H.—December 31, 1965)

This is to acknowledge the receipt of your letter to this office, in which our opinion is requested as to whether or not your interpretation of Chapter 90-12 is correctly applied in connection with license applications for AA School Day Care Service for Children in buildings having occupancy other than schools.

Please be advised that we have examined Chapter 90-12 of the Municipal Code of Chicago, which reads as follows:

"In every building described above as requiring a standard fire alarm system the area of such building shall be the total area of the building and the height shall be the total height of the building including the space used for occupancies other than for institutional, school or Class I Hotel occupancies";

and from such examination, we are of the opinion it applies only to *institutional* buildings. A good example where said Chapter 90-12 may be applied, is shown when a hospital leases office space to doctors in the same building. Such office space must be equally protected against fire hazards as the hospital itself is protected.

Please be further advised that we have considered as an answer to your question Chapter 48-12.3 of the Code, which reads as follows:

"When a building is occupied by two or more occupancies not included in one classification, the provisions of this code applying to each use shall apply to such parts of the building as come within that classification."

and

Chapter 48-12.5 of the Code, which reads as follows:

"Each occupancy in a building of mixed occupancy shall be wholly separated horizontally and vertically from any adjoining occupancy by construction materials providing fire resistance as established in Table 48-12.5."

In view of the above, we are of the opinion that AA School Day Care Service for Children may be located in mixed occupancy buildings provided such area is wholly separated horizontally and vertically from any adjoining occupancy and a standard fire alarm system is installed in accordance with the provisions.

INSIGNIA OF HOUSE OF CORRECTION EMPLOYEES

(Chairman, Board of Inspectors, House of Correction—M. C. H.—February 18, 1966)

This is to acknowledge receipt of your letter to our office in which you state that you have a morale problem regarding proper identification items to be worn by House of Correction guards which will command the respect of the inmates.

Chapter 25-11 of the Municipal Code of Chicago provides as follows:

"The head of every department or other agency of the city government shall furnish, at the expense of the city, to each employee in his department or agency whose duties bring him in contact with the public at places other than the city hall or other municipal buildings, a badge of authority, showing the nature of the employment of such person, which badge shall be worn at all times when the employee is on duty.

"The badges issued in each department or agency shall be numbered in consecutive order, and the name of the employee to whom each number is issued shall be kept in a register maintained by the head of the department or agency. In case any such employee ceases to be in the employ of the city, or shall be transferred to some other position where such badge is not required, he shall immediately surrender such badge to the head of the department or agency."

In accordance with said chapter above cited, we are of the opinion that the insignia of your House of Correction guards must be a badge as distinguished from a star so that such insignia will not be mistaken as giving the House of Correction guards any police powers outside of the House of Cor-

rection enclosure, unless the guards duties bring him in contact with the public at places other than the area which he guards. The differentiation between the badge and star must be such that it will not be mistaken for anything else but the insignia of a House of Correction guard for the City of Chicago.

PRIVATE USE OF PUBLIC FACILITIES PROHIBITED

*(Chairman, Board of Inspectors, House of Correction—W. M. Z.—
December 5, 1966)*

Please refer to your communication of November 7, 1966 addressed to our office, which among others, states as follows :

“Attached are communications dated October 17 and October 27, 1966, from Mr. Richard H. Squier, General Manager, Motel Investment Company regarding usage of the House of Correction Correctional Farm sewer system.

They will expend all monies for installation of a line to the sewer system in addition to a fee for the temporary period of use.

May we have your counsel in this transaction.”

We wish to advise you that it is our opinion that the House of Correction may not enter into an agreement authorizing the Motel Investment Company to use the House of Correction Farm sewer system.

The system is a private installation and cannot be used for public purposes. The House of Correction was created for one purpose only and is not authorized to carry on business of any other nature.

We trust this is the information you desire.

CHAPTER II—RIGHTS AND DUTIES OF CITY EMPLOYEES

Section A. CIVIL SERVICE

FALSIFICATION OF APPLICATION

(Purchasing Agent—R. J. C. & S. R. D.—February 8, 1961)

Your letter of December 7, 1960, states that Andrew C. Sokol was a temporary city employee for 18 years as an Asphalt Inspector; that he made application for a civil service examination as an Analytical Chemist I; and that in his application he certified that his educational background included 93 semester credit hours at the University of Illinois. He successfully passed the examination (presumably being given credit for education which would increase his mark on the examination) and was certified to the position on October 16, 1960. You state that he is now in his probationary period and that the Civil Service Commission found that he never attended the University of Illinois, which he readily admitted to the Commission.

You further state that the Civil Service Commission has requested that you initiate action from which we infer that you are to take steps to effectuate Sokol's discharge from the service during the probationary period.

Your particular question appears to be whether or not Sokol can be rehired as a temporary appointee by your Department in the event he is discharged from the service as a civil service employee. This is not a legal matter, but one of policy.

Rule II, Section 6 of the Rules of the Commission provides that proof of false statements is grounds for dismissal from the service. Inasmuch as Sokol is a probationary, he may be discharged summarily under Section 10 of the Cities Civil Service Act (Ill. Rev. Stat. 1959, chap. 24½, par. 48) by the Department Head with the consent of the Commission. Rule IV, Section 6, provides that the discharge of a probationary is not effective until the appointing officer has received the written consent of the Commission.

Of interest is Rule IX, Section 2, which provides that employees may resign their positions and which requires that a copy of the resignation be filed with the Commission by the Department Head who accepted the resignation. The Section also permits withdrawal of the resignation within 30 days after filing provided that the Department Head approves the action.

The only proper action in this matter is for the Department Head to discharge Sokol under the provisions of the Act and the Rules as a probationary employee. Thus, Sokol will not be in a position to institute legal proceedings against the City, which might be the case if attempts were made to terminate his relationship with the City in some devious way. The true facts should be made a matter of record.

Again, your principal question seems to be a matter of policy within the discretion of the Department Head. If you wish to re-hire Sokol on a temporary basis after he is discharged, there is no legal reason to prevent such action.

DISCIPLINE FOR "CAUSE"

(*Purchasing Agent—H. H. P. & S. R. D.—February 20, 1961*)

We have your letter dated February 14, 1961, in which you state that Sam Hamil, a civil service elevator operator, employed by the Department of Purchases, Contracts and Supplies, refuses to take a polygraph examination requested by you in connection with an investigation of a shortage of City property from a City warehouse where he is employed; and that all other employees having access to such property have taken such examination. You request our opinion as to what you can do about such refusal.

Section 12 of the Cities Civil Service Act (Ill. Rev. Stat. 1959, chap. 24½, par. 51) provides that no civil service employee shall be removed or discharged, or suspended for a period of more than 30 days, "except for cause."

In *Murphy v. Houston*, 250 Ill. App. 385, 394 (1928), it was held that "cause" means some substantial shortcoming which renders continuance in employment of an employee to be in some way detrimental to the discipline and efficiency of the public service and something which the law and a sound public opinion recognize as a good cause for such employee no longer occupying his position; and that it is for the civil service commission to determine what is cause for removal of a public employee, though it may not make an arbitrary and unreasonable rule in such respect.

In *Frazee v. Civil Service Board of City of Oakland*, 338 P. 2nd 943 (Cal.) (1959), it was held that a police officer, accused of a crime by a citizen, who refused to take a polygraph test could be discharged. The court said (p. 945):

"... we conclude . . . that it does not affirmatively appear . . . that the Chief of Police acted arbitrarily, capriciously or unreasonably in ordering appellant (police officer) to submit to a polygraph test, nor does it affirmatively appear . . . that appellant had any valid excuse or justification for refusing to take the test. His refusal therefore constituted a proper basis for his discharge from the Police Force."

It is our opinion that under the circumstances herein you would be justified in ordering Hamil to take a polygraph test that would be confined to the purpose of your investigation. In the event he refuses to do so, you may proceed to take such disciplinary action you deem necessary.

CIVIL SERVICE EMPLOYEES IN MILITARY SERVICE

(*City Comptroller—G. F. M.—May 9, 1961*)

In response to your request for an opinion as to whether or not the City of Chicago is obligated under the Statutes of the State of Illinois to pay a certain voucher, the following is submitted.

Your letter states that a certain Viggo T. Miller was in the military service during the period of January 1, 1952 through April 14, 1954; that Samuel L. Andelmann, the Commissioner of Health, explained that a voucher, attached to the letter forwarded with the request for the opinion, represented payments due the pension fund of which Mr. Miller was a member in lieu of contributions for the aforementioned Mr. Miller, during the period he was in the military service; that Mr. Miller resigned from his position as Bacteriologist I, on February 1, 1961; and that you would appreciate receiving an

opinion as to whether or not, under the Statutes of the State of Illinois, the City of Chicago is obligated to pay the voucher.

Section 3 of an Act entitled "An Act authorizing Municipal Corporations to preserve Civil Service and Pension Rights of their Employees inducted into or enlisting in the land or naval forces of the United States, or ordered to active duty of the land or naval forces of the State" (Ill. Rev. Stats. 1959, Chap. 24½, Sec. 152) provides therein as follows:

The Corporate authorities of any such Municipal Corporation may provide that, during the period of such furlough or leave of absence (for military service), payments shall be made to any pension fund from any funds under their control in lieu of deductions which would have been made from the salary of such employee had he continued in active service as an employee of such Municipal Corporation and in that event the pension trustees shall treat such payments in the same manner and with the same effect as if such payments were deducted from the salary of such employee and shall also credit such employee with concurrent contributions or other credits from the Municipal Corporation from taxes levied or to be levied for any purposes as may be provided in the Act creating such pension fund for contributors thereto."

The City Council of the City of Chicago on November 6, 1940, adopted a resolution for payment by the City of Chicago of annuity contributions of city employees in the land or naval services of the United States Government (Journal of the proceedings of the City Council of the City of Chicago, Nov. 6, 1940, page 3411).

This resolution provided, in part thereof, as follows:

"Be it further resolved the head of every department of the City government be and he hereby is directed to save from the annual appropriations for salaries for his department an amount equal to the deductions from the salaries of employees for annuity funds so that every employee on leave of absence for training and service in the land or naval forces of the United States may secure the benefit of accumulating to his credit in his Annuity Fund an amount he would accumulate by continuous service in the city and payment of his salary during his period of training and service in the land and naval forces of the United States."

It has been the custom of the City of Chicago and the heads of the Departments therein to pay into the various annuity and benefit funds of the City of Chicago an amount equal to the deductions that would have been made from the salaries of their employees in the land or naval forces in the United States.

While, perhaps, it is unfortunate that these provisions, both of the statutes and of the City Council had not been changed, or limited to a certain period of time, nevertheless, until such time as such statutes and resolutions have been changed, it is our opinion that any employee in the City of Chicago, serving in the land or naval forces of the United States, is entitled to have amounts equal to the deductions that would have been made from his salary if he were working paid into the annuity and benefit fund of which he is a member.

We were further of the opinion that the voucher enclosed with your letter, which is returned herewith, should be paid into the pension fund of which Mr. Viggo T. Miller is a member.

PSYCHIATRIC SCREENING OF POLICEMEN

(President, Civil Service Commission—C. H. L.—May 25, 1961)

Your communications dated May 3 and May 15, 1961, on the above subject matter sets out that the Civil Service Commission and the Police Department have reached agreement on a tentative program for psychiatric screening of new patrolmen, and you ask our opinion as to whether there are any legal reasons why this program should be altered to insure the rejection of eligibles who are unqualified for emotional reasons, stating that some of these eligibles have already been certified.

Our first observation is that the proposed plan to schedule psychological examinations of new patrolmen is to have them examined by a board of psychiatrists *after* certification by the Civil Service Commission and *before* appointment, and that this board will then make recommendation regarding the acceptability of the eligibles for police work to the Civil Service Commission, and that if the person has failed to qualify, then the Police Department will request that his certification be withdrawn by the Civil Service Commission and his name be stricken from the eligible list.

The situation at hand involves a study of the provisions of the Cities Civil Service Act and the Rules and Regulations of the Civil Service Commission which have a bearing on the subject matter.

A civil service position can be filled only upon a requisition first made to the Civil Service Commission, informing them of the existence of a vacancy and requesting certification of a civil service eligible for appointment. An eligible list is of course the result of an examination.

In *People ex rel. Roderick v. City of Chicago*, 283 Ill. 462 the court said at page 465:

"The City Civil Service act provides in section 3 that no appointment shall be made in the classified civil service of the city except according to the provisions of that act. Section 10 provides that the head of the department or office in which a position in the classified service is to be filled shall notify the commission, that the commission shall certify to the appointing officer the candidate standing highest on the eligible list, and that the appointing officer shall fill the place by the appointment of the person so certified."

In *Gilbert v. Hurley*, 336 Ill. App. 205 the Court said at page 215:

"The law is well settled in this State that the Civil Service Commission exercises purely statutory powers, and must find in the statute its warrant for the exercise of any authority it claims. *Funkhouser v. Coffin*, 30 Ill. 257."

We find no provisions in the Cities Civil Service Act, the Rules and Regulations of the Civil Service Commission, the ordinance of the City of Chicago or Rules of the Department of Police for taking examinations conducted by psychiatrists into account in Civil Service examinations.

In *McKeown v. Hurley*, 343 Ill. App. 413 (1951) the court, quoting from *Williams v. Errant*, 229 Ill. 56, said:

"The first and most important object to be accomplished by a system of civil service is to increase the efficiency of the service . . . Among the means devised to secure the highest degree of efficiency are the assurance that . . . faithful, honest and efficient service in one position will open up possibilities for future promotion to a better one."

We have carefully studied the sections of the Cities Civil Service Act and the Rules and Regulations of the Civil Service Commission and find the following provisions which have a bearing on the subject.

Section 4 of the Cities Civil Service Act authorizes the Civil Service Commission to make rules to carry out the purposes of the Act and reads as follows:

"Sec. 4. Rules. Said commission shall make rules to carry out the purposes of this act, and for examinations, appointments and removals in accordance with its provisions, and the commission may, from time to time, make changes in the original rules."

In *Caslin v. Geary*, 330 Ill. App. 172 at pages 178, 179 the Court held:

"A consideration of these statutory provisions indicates that it was the intention of the State Legislature to make the Civil Service Commission the personnel agency entrusted with the duty of providing qualified personnel for the public service, and to this end it was given power to conduct examinations, prepare eligible lists and make rules to carry out the purposes of the Act."

A valid rule of the Civil Service Commission is as binding as if made directly by the legislature. *Lindblom v. Doherty*, 102 Ill. App. 14, 29; *City v. Bullis*, 124 Ill. App. 7, 17 (affirmed in 221 Ill. 379); *People Bergouist v. Gregory*, 337 Ill. App. 661; *People Gilbert v. Hurley*, 336 Ill. App. 205; *People Caslin v. Geary*, 330 Ill. App. 172.

Section 6 of the Cities Civil Service Act which pertains to the scope and purpose of examinations of applicants for all places in the classified service provides in part as follows:

"Sec. 6. Examinations. All applicants for offices or places in said classified service, except those mentioned in Section 11, shall be subject to examination, which shall be public, competitive, and open to all citizens of the United States, with specified limitations as to residence, age, health, habits and moral character.

* * *

Such examinations shall be practical in their character, and shall relate to those matters which will fairly test the relative capacity of the persons examined to discharge the duties of the positions to which they seek to be appointed, and shall include tests of physical qualifications and health, and when appropriate of manual skill.

* * *

No question in any examination shall relate to political or religious opinions or affiliations. The commission shall control all examinations, and may, whenever an examination is to take place designate a suitable number of persons, either in or not in the official service of the city, to be examiners, and it shall be the duty of such examiners, and, if in the official service, it shall be a part of their official duty, without extra compensation, to conduct such examination as the commission may direct, and to make return or report thereof to said commission, and the commission may at any time substitute any other person whether or not in such service, in the place of any one so selected; and the commission may themselves at any time act as such examiners, and without appointing examiners. The examiners at any examination shall not be members of the same political party.

In the event that any applicant for an office or place in the civil service (who has been found eligible for appointment and whose name has been placed upon the register provided for in this act) has not been appointed to such office or place within sixty days from the date of his examination as to physical qualifications and health, the commission shall cause a second examination to be made of said applicant prior to

his appointment and within sixty days of such appointment, which second examination shall be practical in character and shall relate to the cardiac, pulmonary, arterial, renal and sane condition of said applicant. If, upon such second examination, the physical, or mental condition of said applicant shall be found to be less than the minimum standard fixed by the rules of such commission, said applicant shall not be appointed. The name of said applicant shall be retained upon the register of candidates eligible for appointment and when again reached for certification and appointment the said applicant shall be again examined as herein provided, and if the physical or mental condition of the said applicant shall again be found to be less than the minimum standard fixed by the rules of such commission, said applicant shall not be appointed and the name of said applicant shall be removed from the said register."

Under the provisions of said Section 6 of the Act the conduct and control of all examinations for civil service positions is exclusively within the Civil Service Commission's executive discretion and is not subject to review, revision or regulation by any other department of the City of Chicago or by the Courts in the absence of such abuse or discrimination as amounts to irresponsible caprice or fraud.

In the last paragraph of Section 6 of the Act above quoted we find the only provision for a second examination of an applicant whose name has been placed on an eligible list and who has not been appointed within sixty days from the date of his examination as to his physical qualifications and health.

We refer to that part of said Section which provides:

"* * * the commission shall cause a second examination to be made of said applicant prior to his appointment and within sixty days of such appointment, which second examination shall be practical in character and shall relate to the cardiac, pulmonary, arterial, renal and *sane condition* of said applicant. If, upon such second examination, the physical, or mental condition of said applicant shall be found to be less than the minimum standard fixed by the rules of such commission, said applicant shall not be appointed. The name of said applicant shall be retained upon the register of candidates eligible for appointment and when again reached for certification and appointment the said applicant shall be again examined as herein provided, and if the physical or mental condition of the said applicant shall again be found to be less than the minimum standard fixed by the rules of such commission, said applicant shall not be appointed and the name of said applicant shall be removed from the said register."

Section 10 of the Cities Civil Service Act provides in part as follows:

"Section 10. Appointment to Classified Service. The head of the department or office in which a position classified under this act is to be filled shall notify said commission of that fact, and said commission shall certify to the appointing officer the name and address of the candidate standing highest upon the register for the class or grade to which said position belongs * * *."

In the case of *Foley v. Prendergast*, 345 Ill. App. 235 (December, 1951), the Court held, beginning at page 237:

"Section 10 of the Cities Civil Service Act provides:

"The head of the department or office in which a position classified under this act is to be filled shall notify said commission of that fact: and said commission shall certify to the appointing officer the name and address of the candidate standing highest upon the register for the class or grade to which said position belongs, * * * The appointing officer shall notify said commission of each position to be filled, separately, * * *."

The names of the men you speak of in your communication had attained their position on the patrolmen's eligible list by their previous examination, physical and mental, and it was therefore the duty of the Civil Service Commission under said Section 10 to certify them for appointment. This duty was purely ministerial with no discretionary power to act.

Rule III, Examinations, of the Civil Service Commission provides as follows:

Rule III.

Examinations.

Section 1. General Scope. The general scope of all examinations shall include the subjects upon which applicants are to be examined, with the weight given to each subject to represent its value in determining general average. The subjects and respective weights in both original and promotion examinations for any office or place shall conform to the schedules prescribed in the published notices of examinations given as provided for in Section 7 of the Civil Service Act.

Section 2. Ratings and Averages. Each subject of examination shall be rated independently on the scale of 100. The rating of each subject shall be multiplied by the weight assigned to such subject. The resulting product shall be added and the total product divided by the total weights of all subjects in the examination. The resulting quotient is the general average which shall determine the order in which the name of the eligible shall appear upon the eligible register.

Section 3. Eligible Register. Except as otherwise specifically provided by law or in these rules, eligible registers shall be compiled from the averages computed according to the preceding section, and the name of no person shall be entered on an eligible register resulting from an examination whose general average shall be less than 70% of complete proficiency in the subjects of examination taken as a whole. The names of eligible shall be entered upon registers in the order of their average percentages provided that whenever two or more eligible shall have the same average percentage, priority in time of filing of application, or of registering for promotion shall determine their respective standing.

* * * *

Section 7. Scope of Subjects. The subjects of examinations may include duties of positions, educational tests, *aptitude tests*, practical tests, performance tests, manual tests, personality tests, courtesy and discipline tests, reports, discussions or theses, statements of experience, tests of knowledge of civil government, tests of knowledge of the City of Chicago, tests of knowledge of laws and ordinances, ascertained merit or efficiency, seniority of service, medical examinations, physical tests, or any or all of them, and such subjects may be given in whole or in part in the form of a written test, or an oral test, or an ocular demonstration, or a performance test, or a manual test, or other practical tests, or any or all of them, according to the schedule of subjects with weights assigned, set forth in the published notices of examinations or as provided therein.

Section 8. Medical and Physical Examinations. The Commission may determine by medical and physical examinations and height and weight requirements whether applicants for any position possess the prescribed standards of health and physique. The result of such examinations may be considered only in determining the fitness of applicants to be examined, or may be taken as a factor in determining general averages according to the published notices of examinations.

* * * *

Section 11. Unless otherwise specifically provided by the Commission in an order entered in the minutes of a meeting thereof, the members of the Commission and the Secretary and Chief Examiner shall for

the purposes of Section 6 of the Civil Service Act act as examiners, and without appointing examiners, for each and every civil service examination, being or to be conducted by the Commission, and that unless otherwise so ordered, no member of the Commission's staff and no other person, whether in or not in the official service of the City of Chicago, who shall furnish advice, information or assistance to the Commission or its staff in the preparation or conduct of any such civil service examination, or of any phase thereof, shall be or act as or be deemed to be an examiner in such examination for the purposes of the said Section 6 of the Civil Service Act."

You will note that in Section 7 of Rule III above quoted that the subjects of examinations may include aptitude tests which we take to mean tests to determine an individual's potential ability or capacity for learning a certain performance or kind of work.

Such tests we believe could well be conducted by psychiatrists or alienists who make a specialty of diseases of the mind, if the Civil Service Commission feels that they should so be employed, but they should be so employed *before certification*.

Rule IV. Certification of the Civil Service Commission provides as follows:

Rule IV.

Certifications.

"Section 1. Requisitions. Requisitions for certification shall be upon forms prescribed by the Commission and shall specify the title, branch, class, grade or rank, general duties and compensation of the position to be filled. Where vacancies are to be filled from a promotion register, the Commission shall certify same to the appointing officer the names of the three standing highest on such register, and where there are less than three names thereon, the Commission shall certify same to the appointing officer who shall appoint one of those so certified.

Section 2. Certification. A written notice, upon blanks prescribed by the Commission shall be mailed to the eligible, at his latest address as shown by the records of the Commission, stating that his name has been certified to the appointing officer. A similar notice shall be sent to the appointing officer, containing the name of the eligible certified. * * *

Regulation III, Examinations of the Civil Service Commission provides as follows:

Regulation III.

Examinations.

"1. Medical and physical examinations shall be under the direction of an examiner in charge, subject to the chief examiner. *Medical examinations may be conducted only by regularly licensed physicians employed for that purpose.*

* * * * *

2. Medical records shall be signed by the physician making an examination, and physical records shall be signed by the physical examiner. In case of rejection the cause shall be clearly set forth, and shall be subject to verification.

3. In the medical and physical examination of a large number of candidates only so many shall be summoned each day as may be conveniently examined, and the examination may be continued on subsequent days until the same is completed.

4. Applicants shall fill out such forms and answer such questions as may be required for the purpose of identification or for medical and surgical information, and when required to do so shall make such written statements and answers under oath.

5. *In every case in which medical and physical examination is required an applicant shall first be examined medically.*

6. *If at any time during medical or physical tests in an original entrance or promotion examination cause for rejection of an applicant is found and determined, his examination shall be terminated, and such applicant shall be notified of his rejection.*

* * * * *

7. When doubt exists as to the ultimate medical fitness to meet the requirements of a position, the applicant may be accepted conditionally until further medical examination. Such acceptance shall be permissible only when surgical operation may qualify an applicant, or when physical disqualifications may be temporary.

8. Applicants accepted conditionally shall be permitted to participate in all parts of the examination. *Final qualification shall depend upon medical re-examination, provided that no such re-examination shall be permitted after the posting of an eligible list affected thereby unless the Commission, by special order in the minutes, shall stipulate the conditions under which such medical re-examination may be held."*

Regulation V of the Civil Service Commission provides as follows:

Regulation V.

Special Examiners and Monitors.

"1. Unless otherwise ordered by the Commission, the Chief Examiner may designate a sufficient number of persons to act as monitors and to assist the Commission in the administration of any examination.

2. *For the purposes of Section 6 of the Civil Service Act, the Commission may, when it deems such action necessary or desirable, in an order entered in the minutes of a meeting thereof appoint examiners, special examiners or examining boards to assist the Commission in the conduct of a particular examination or of any phase thereof, and such examiners or examining boards shall perform such functions as may be specifically directed by the Commission, but any such examiner or any member of such an examining board may be discharged by the Commission at any time and any other person or persons substituted therefor. Any such examiner or examining board shall be at all times subject to the direction and control of the Commission."*

It is the fact, and the Illinois Courts of resort have very recently held and affirmed, that the conduct of the business of the Civil Service Commission and civil service examinations, pursuant to the applicable statute and Rules, is executive and administrative in nature and that the courts may not interfere therewith under the constitutional provisions which forbid the infringement of one branch of government upon the sphere of conduct of another.

We submit that neither under Section 6 of the statute, nor under the Sections of the Rules quoted above, is it specified that tests of physical qualifications or health must be given at any certain time, and that it is apparent under the quoted Rule that such tests may begin at any time *before certification or appointment* to the position of patrolman or any other civil service position.

It is most important that applicants possess the requisite physical qualifications and health at or immediately before the time they enter the City's Service, namely at or immediately *before certification or appointment*, and it is

and always has been, the policy of the Commission to conduct such examinations of applicants at said time for the said most practicable purpose and as the most practicable procedure, and we submit that the Commission does not abuse its power in following such procedure, and that such procedure satisfies every requirement of the substantive law applicable.

The tentative plan submitted to us for consideration, viz., that *after the names of the eligible have been certified* by the Civil Service Commission psychological examinations for all eligibles shall be scheduled before their appointment, and that on the basis of the result of these examinations some of these eligibles will be interviewed by a board of psychiatrists and the board will then make recommendations regarding the acceptability of the eligibles for police work.

We desire to give you the opinion that those requirements for qualification into the classified service of policemen are not warranted by, and, as we believe, are in excess of and contrary to the requirements of the Civil Service Act and Rules and Regulations of the Civil Service Commission set out herein above as a test for entrance into the police service under the present law.

The Civil Service Act and the Rules of the Civil Service Commission do not provide for a contingency such as the one here under discussion.

As a matter of policy, however, with respect to improving the administration of all the laws here involved the plan seems to commend itself favorably, but the law as it is at present makes this impossible and requires amendment either of the Civil Service Act or the Rules and Regulations of the Commission.

We cannot venture to express any more particular opinion as to what should be done in the matter than is herein stated.

ADMINISTERING POLYGRAPH TEST TO POLICEMEN

(President, Civil Service Commission—J. C. M.—May 25, 1961)

In your letter of May 22, 1961, you state :

“The Police Department has indicated to us that they are interested in administering polygraph tests to a limited number of patrolmen applicants. These would be administered after certification and before appointment as in the case of the psychiatric screening.

“Does the Police Department have the authority to refuse to appoint applicants because they refuse to take such test, or because such tests produce evidence that would indicate the applicant was not acceptable for police work?”

The City of Chicago, through its proper department, has authority to order any employee to take polygraph tests where there is reasonable grounds to believe that such tests will reveal information bearing upon the qualifications of the individual, or the efficiency and honesty in the performance of his duties. The city having that authority over its employees, it is our opinion, that the city in endeavoring to make a determination as to whether an applicant is fully qualified to occupy a position of employment with the city has the authority, upon written notice and demand, to require the applicant to submit to polygraph tests. The notice and demand should be specific as to the time and place, as to when and where the applicant is to appear for such tests, so that the failure to obey the order will be a sufficient basis for removing the applicant from the certified list.

Assuming that the applicant submits to a polygraph test and the Police Department determines that the applicant does not have sufficient qualifica-

tions to perform the duties of a police officer and requests the Civil Service Commission to consent to the elimination of such applicant as a certified employee, the Police Department should submit to your Commission all of the facts and data upon which it based its conclusion that the applicant is not qualified.

The applicant may refuse to submit to polygraph tests but his failure to do so would be a disobedience of an order of the Department. It would appear to us that it would be better procedure for the Civil Service Commission to join with the Police Department in issuing the written order for the applicant to take polygraph tests. The statute empowers the Civil Service Commission in this regard and there might be some litigation arising out of the question as to who has the authority to take such tests. This doubt could be cured, in the first instance, by having both the Civil Service Commission and the commanding officer of the Police Department issue the order.

PROBATIONARY EMPLOYEE'S RIGHTS

(Superintendent of Police—C. H. L.—July 17, 1961)

Probationary patrolman Richard J. Zemroz has filed the above complaint for mandamus for re-appointment to the position of patrolman, for salary from the time of his illegal removal from said position, and his credit for all time accruing subsequent to the date of his alleged illegal removal from his position on, to-wit: April 28, 1961; for pension salary, seniority and service purposes.

Previous to filing his suit he filed his demand for reinstatement on June 9, 1961.

The complaint sets out the following facts, which your department's records should verify:

1. He was appointed a patrolman on January 30, 1961.
2. Immediately after his appointment he was assigned to the Police Training School for thirteen weeks and once each week was given a selective answer written examination, and on the last day of said schooling he was informed that his average in the aforesaid tests was 69.4 and thus failing to obtain an average of 70 in said tests.
3. Subsequent to his appointment as a patrolman on January 30, 1961, he was given no actual police duties to perform and was at no time assigned to a police district or any police bureau or division for the actual performance of police duties.
4. On April 28, 1961, he was suspended.
5. The records of the Civil Service Commission do not show that he has been discharged, nor do they show that any written request or authority to discharge him has been forwarded by the head of the Police Department to the Civil Service Commission, or passed upon or approved by said Commission.

At the time he was suspended he was therefore a probationer.

In rendering our opinion in this matter we are therefore, bound by the Cities Civil Service Act and the rules of the Commission pertaining to probationers.

Section 10 of the Cities Civil Service Act provides in part as follows:

“* * * The appointing officer shall notify said commission of each position to be filled, separately, and shall fill such place by the appoint-

ment of the person certified to him by said commission therefor, *which appointment shall be on probation for a period to be fixed by said rules* * * * (Italics ours).

In accordance with sections 4 and 10 of said Cities Civil Service Act the Civil Service Commission has adopted the following rule as to the period of probation, Rule IV, section 5 provides:

"Section 5. Probation, original appointment shall be on probation for a period of six months. In no case shall a probationer be discharged until after the appointing officer has received from the Commission a notice in writing that the Commission has approved such discharge. Time served on probation, whether continuous or not, shall be credited upon the period of probation."

The Civil Service Commission is the only body authorized to test the qualifications of applicants for Civil Service positions under the provisions of Section 6 of the Cities Civil Service Act which reads in part:

"Such examinations shall be practical in their character, and shall relate to those matters which will fairly test the relative capacity of the persons examined to discharge the duties of the positions to which they seek to be appointed, and shall include tests of physical qualifications and health and when appropriate manual skill, * * * *The Commission shall control all examinations.*" (Italics ours.)

When the Civil Service Commission, who had conducted the patrolmans examination, certified Zemroz to the Superintendent of Police that he had met the prescribed mental and physical qualifications required by law, he was therefore entitled to be appointed by the Superintendent of Police and to perform police duties.

We can find no provision in the Cities Civil Service Act nor the rules of the Civil Service Commission authorizing the Superintendent of Police to assign an appointed patrolman to a police training school for a physical and mental examination before affording him an opportunity to perform the duties of a patrolman, and then dropping him from the rolls as was apparently done in the instant case.

Section 30 of the Cities Civil Service Act provides:

"*Appointments and Removals to be certified to Comptroller.* The Commission shall certify to the Comptroller or other auditing officers all appointments to offices and places in the classified Civil Service, and all vacancies occurring therein, whether by dismissal or resignation or death. * * *

In *Fish v. McGann*, 205 Ill. 179 the court said at page 186:

"The object of having a period of probation is to determine whether the conduct and capacity of the person appointed are satisfactory, notwithstanding the fact that he has passed the required examination and his appointments has been certified by the Commission to the appointing offices. * * *. It would be impossible for the Commission itself to test the capacity of the person appointed by observing his conduct and supervising his work. The duty of observing his conduct and testing his capacity, in order to determine whether both are satisfactory, properly devolves upon the officer, under whom the appointee serves."

In conclusion we wish to advise you that unless you are of the opinion that plaintiff Zemroz is guilty of some shortcoming in the service such as a refusal to obey a superior officer or failure to perform some duty of a patrolman, etc., and you assign your reason for requesting his discharge, during his probationary period, in writing to the Civil Service Commission and obtaining their consent thereto, the proper action on your part is to reinstate him on the payroll of the Department of Police to serve his full probationary period.

PROBATIONARY EMPLOYEE'S RIGHTS

(*Superintendent of Police—C. H. L.—July 25, 1961*)

Probationary patrolman Edward W. Windle has filed the above complaint for mandamus for reinstatement to the position of patrolman, for salary from the time of his illegal removal from said position, and his credit for all time accruing subsequent to the date of his alleged illegal removal from his position on, to-wit: May 12, 1961; for pension salary, seniority and service purposes.

Previous to filing his suit he filed his demand for reinstatement on June 23, 1961.

The complaint sets out the following facts, which your department's records should verify:

1. He was appointed a patrolman on February 13, 1961.
2. Immediately after his appointment he was assigned to the Police Training School for thirteen weeks and once each week was given a selective answer written examination, and on the last day of said schooling he was informed that his average in the aforesaid tests was 1.9 points less than an average of 70.
3. Subsequent to his appointment as a patrolman on February 13, 1961, he was given no actual police duties to perform and was at no time except for five days assigned to a police district or any police bureau or division for the actual performance of police duties.
4. On May 12, 1961, he was suspended.
5. The records of the Civil Service Commission do not show that he has been discharged, nor do they show that any written request or authority to discharge him has been forwarded by the head of the Police Department to the Civil Service Commission, or passed upon or approved by said Commission.

At the time he was suspended he was therefore a probationer.

In rendering our opinion in this matter we are therefore, bound by the Cities Civil Service Act and the rules of the Commission pertaining to probationers.

Section 10 of the Cities Civil Service Act provides in part as follows:

"* * * The appointing officer shall notify said commission of each position to be filled, separately, and shall fill such place by the appointment of the person certified to him by said commission therefor, *which appointment shall be on probation for a period to be fixed by said rules* * * *." (Italics ours.)

In accordance with sections 4 and 10 of said Cities Civil Service Act the Civil Service Commission has adopted the following rule as to the period of probation. Rule IV, section 5 provides:

"Section 5. Probation, original appointment shall be on probation for a period of six months. In no case shall a probationer be discharged until after the appointing officer has received from the Commission a notice in writing that the Commission has approved such discharge. Time served on probation, whether continuous or not, shall be credited upon the period of probation."

The Civil Service Commission is the only body authorized to test the qualifications of applicants for Civil Service positions under the provisions of Section 6 of the Cities Civil Service Act which reads in part:

"Such examinations shall be practical in their character, and shall relate to those matters which will fairly test the relative capacity of the persons examined to discharge the duties of the positions to which they seek to be appointed, and shall include tests of physical qualifications and health and when appropriate manual skill, * * * *The Commission shall control all examinations.*" (Italics ours.)

When the Civil Service Commission, who had conducted the patrolmans examination, certified Windle to the Superintendent of Police that he had met the prescribed mental and physical qualifications required by law, he was therefore entitled to be appointed by the Superintendent of Police and to perform police duties.

We can find no provision in the Cities Civil Service Act nor the rules of the Civil Service Commission authorizing the Superintendent of Police to assign an appointed patrolman to a police training school for a physical and mental examination before affording him an opportunity to perform the duties of a patrolman, and then dropping him from the rolls as was apparently done in the instant case.

Section 30 of the Cities Civil Service Act provides:

"Appointments and Removals to be certified to Comptroller. The Commission shall certify to the Comptroller or other auditing officers all appointments to offices and places in the classified Civil Service, and all vacancies occurring therein, whether by dismissal or resignation or death. * * *

In *Fish v. McGann*, 205 Ill. 179 the court said at page 186:

"The object of having a period of probation is to determine whether the conduct and capacity of the person appointed are satisfactory, notwithstanding the fact that he has passed the required examination and his appointments has been certified by the Commission to the appointing officer. * * *. It would be impossible for the Commission itself to test the capacity of the person appointed by observing his conduct and supervising his work. The duty of observing his conduct and testing his capacity, in order to determine whether both are satisfactory, properly devolves upon the officer, under whom the appointee serves."

In conclusion we wish to advise you that unless you are of the opinion that plaintiff Windle is guilty of some shortcoming in the service such as a refusal to obey a superior officer or failure to perform some duty of a patrolman, etc., and you assign your reason for requesting his discharge, during his probationary period, in writing to the Civil Service Commission and obtaining their consent thereto, the proper action on your part is to reinstate him on the payroll of the Department of Police to serve his full probationary period.

STRIKING NAMES OFF PROMOTION LIST

(Civil Service Commission President—J. C. M.—August 11, 1961)

In your letter of July 17, 1961, you advise that there are approximately 65 men on an eligible list for a promotional examination held in February and June of 1958, and posted December 29, 1958, and that the head of the department that would affect the individuals remaining on the list has made a request that this list be cancelled (since it is more than two years old), and immediately have a new examination for this particular position.

The Civil Service Commission was created after referendum (Chap. 24½, Section 39). The authority and duties of the Civil Service Commission are specifically set forth in that Act and it is the intention of the legislature that the acts of the Commission shall be independent and shall be free from any influence by any department to whom it certifies candidates for office.

Under Section 48 (10) of the Civil Service Act, it is provided "said Commission may strike off names of candidates from the register after they have remained thereon more than two years". The Commission, without pressure from any other body, should determine whether the eligible list for promotion is still suitable to fulfill the function for which it was intended. It is not within the province of a head of a department to determine whether the eligible list should be stricken, but that determination can only be made by the Civil Service Commission.

In the past where eligible lists have been stricken the City has experienced considerable litigation over the justice of such action, particularly where for months prior to the time of striking the eligible list there were vacancies that could have been filled from that list. It is the intention of the legislature that vacancies occurring in Civil Service positions be filled, as they occur, by persons appearing on the eligible list. Litigation has usually followed and tied up promotions for long periods of time where department heads have arbitrarily refused to fill vacancies where there have been proper appropriations. This has been particularly true insofar as the Police Department of the City of Chicago is concerned.

EFFECT OF SUSPENSION ON WAGE CLAIMS

(Superintendent of Police—C. H. L.—August 18, 1961)

We acknowledge receipt of your communication dated June 2, 1961, on the above subject, attaching a letter sent you by Thomas E. Keane, Chairman Committee on Finance, dated May 24, 1961; a letter from James Osborne, Secretary of the Civil Service Commission to Attorney Houston H. Hall, dated April 26, 1961; McGuire's claim for wages for period of suspension presented by Ralph H. Metcalfe, alderman of the 3rd ward and copy of a letter from James J. Doheny, Department Advocate to Mr. Herman Goldstein, Executive Assistant to the Superintendent, dated June 1, 1961.

We have previously replied to your letter of June 2, 1961 in re patrolman Vincent B. Boyle's claim for salary, on July 25, 1961.

In answer to your said letter of June 2, 1961 re McGuire's claim for salary please be advised that the Civil Service Commission's records show the following:

1. Suspended May 20, 1959 M355393
2. Charges were filed against him by Timothy J. O'Connor Commissioner of Police with the Civil Service Commission on June 30, 1959.
3. Set for hearing on July 22, 1959.
4. On motion of McGuire this case was continued from trial to time and he signed salary waivers for the periods July 29, 1959, to April 26, 1961.
5. On April 26, 1961 the hearing was had and the charges were dismissed.
6. He was restored to duty on April 26, 1961.

In view of the above facts, we are of the opinion that McGuire is not entitled to pay for the first 30 day suspension period, viz: May 20, 1959, to

June 20, 1959, as under the provisions of Section 12 of the Cities Civil Service Act the head of a department has the right to suspend a subordinate for a period of not to exceed 30 days.

For the period June 21 to July 29, 1959 the case was continued by the Civil Service Commission and he signed no salary waiver for that period.

He is not entitled to pay for the period July 29, 1959 to April 26, 1961, for which he signed salary waivers.

In conclusion he is entitled to pay only from the end of the first 30 day suspension period viz: June 21, 1959 to July 29, 1959, unless he had outside earnings which the city has the right to deduct. You should therefore have him sign an affidavit showing that he had outside earnings or not.

We return herewith the documents pertaining to McGuire's claim attached to your letter.

USE OF ALIAS

(Retirement Board of the Laborers' and Retirement Board Employees'—G. F. M.—November 9, 1961)

In response to your request for an opinion concerning the rights of Sophie Sirmarco, the widow of Nick Sirmarco, the following is submitted.

Your records contain a great deal of information involving Vito Izzo and Nick Sirmarco. From it may be drawn the fact that one Nick Sirmarco took over and occupied the position of Vito Izzo as an asphalt helper; that he worked in such position for a great many years even to the extent of having the job become a Civil Service job under the name of Vito Izzo; he even went so far as to borrow money under the name of Vito Izzo for the purpose of purchasing a home. His marriage certificate shows that he was married under the name of Nick S. Sirmarco to Sophia M. Lucciardi on December 27, 1950.

There is to be drawn from all material in your file the fact that Nick Sirmarco took the place of Vito Izzo as an asphalt helper for the City of Chicago, and continued to work in that position until his death.

While there is no objection to a man changing his name, it is illegal for an individual to change his name in order to benefit from such change by reason of fraud. When Nick Sirmarco changed his name to Vito Izzo for the purpose of taking a job of another person, it appears to this assistant to be a fraudulent endeavor on his part to gain something not rightfully his, i.e., a job with the City of Chicago.

We are therefore, of the opinion that any rights springing out of the position held by Nick Sirmarco, as Vito Izzo, are nil. We are further of the opinion that there would be payable to the beneficiaries of Nick Sirmarco, known as Vito Izzo, only a return of the monies which Mr. Sirmarco had deducted from his salary when he worked as Vito Izzo. While there is no question in the mind of this assistant that Nick Sirmarco and Vito Izzo are one in the same person, there is also no question in the mind of this assistant that a job illegally secured would pay no benefits that may be passed along after the death of the person concerned.

We are, therefore, of the opinion that a refund should be made of the monies paid in by Nick Sirmarco, also known as Vito Izzo, as deductions made in error, inasmuch as Nick Sirmarco was not entitled to hold the job in the first place.

DISCHARGE FOR CAUSE

(*Fire Commissioner—R. L. C.—February 14, 1962*)

We are in receipt of your letter of February 1, 1962 wherein you inquire as to the applicability of Section E (2) (d) of the Employees Compensation Plan for 1962 (Council Journal p. 6555). Said section is as follows:

"In the event the employee has not taken his vacation as provided herein by reason of separation from service, other than by discharge for cause he, or in the event of death, his widow or estate, shall be entitled to receive his prevailing salary for such unused vacation period".

The language is unequivocal in setting "separation from service, other than discharge for cause" as the standard to be applied in determining an employee's right to unused vacation compensation.

The word "cause" has been defined in Civil Service matters to mean

"some substantial shortcoming which renders his continuance in office or employment in some way detrimental to the discipline or efficiency of the service" (*Heaney v. City of Chicago*, 117 Ill. App. 405).

The Civil Service Commission alone has the power to "discharge for cause" (Chap. 24 Section 10-1-18 Ill. Rev. Stat. 1961). It is therefore our opinion that any employee who is separated from service, other than by order of the Civil Service Commission, would be entitled "to receive his prevailing salary for such unused vacation period". It is further our opinion that a leave of absence is not to be construed as being "separation from service" and therefore would not secure for the employees the benefit of Section E (2) (d).

DISCHARGE FOR FAILURE TO PAY DEBTS

(*Commissioner of Streets and Sanitation—C. H. L.—March 14, 1962*)

We acknowledge receipt of your communication dated March 8, 1962, in which you request our advice as to what action should be taken in regard to John F. Bourne, an employee of the Bureau of Electricity, who apparently reflects discredit to the service on account of debts incurred by him.

In your letter you also refer to your letter of February 2, 1962, on the same subject matter, after the receipt of which Assistant Corporation Counsel John F. Thornton spoke to your Mr. Fleischer and advised him that you have the authority to file charges against Bourne for non-payment of his debts.

We agree with Mr. Thornton's advice to you and to give you a clear understanding of the matter we give you below the Appellate and Supreme Courts opinion in a similar case as expressed in the following case:

In *Elmore v. Allman*, 314 Ill. App. 194, abstract opinion rendered on March 24, 1942 the Court in reversing Judge Fisher of the Circuit Court held that Elmore was properly discharged for conduct unbecoming a police officer and for neglect to pay, within a reasonable time, just indebtedness incurred while in the service.

The Court in its 18 page opinion delivered by presiding justice Scanlan held:

"All must agree that if a person owes a just debt and does not pay it because he is unable to pay it, he is not dishonest; but if he owes a just debt and refuses to pay it when he has the ability to pay it he is dishonest. The specifications in the instant case not only charge that the relator incurred indebtedness and failed to pay the same, but 'that the said Patrolman Charles H. Elmore *has no just or valid reason or excuse* for his failure to pay his said indebtedness;' 'that he has persistently *refused* to pay his said indebtedness.' The specifications apprised the relator that he was charged with being a dead-beat, and they charged 'that the failure of the respondent to pay these honest debts is due to dishonesty.' The specifications also charged that the relator cashed three checks with the Belmont-Central Currency Exchange which were returned 'no account,' and that he cashed a check with Freeman Bros. which was returned 'no account.' Those charges as to cashing checks charged the relator with serious criminal acts. The specifications further charged him with lying to his superior officer and with deceiving the Commission. They further charged that the relator was suspended from duty six times for failure to make payments as agreed on claims filed against him, and that 'additional claims are continually being filed against him.' The specifications further charged that he filed a petition in bankruptcy and scheduled approximately \$1,500 in debts, *the major part of which was made up of rent and cash loans.* Other charges are contained in the specifications, but it is unnecessary to detail them. The claim of counsel for the relator that the charges filed before the Civil Service Commission against relator do not furnish sufficient grounds for his removal is without the slightest merit. The record of the Civil Service Commissioners shows that the relator was represented at the hearing by counsel, and there is nothing in the record to show that the point now made was raised before the Commission. We feel impelled to say that the counsel defending the relator must have been embarrassed by the number and the seriousness of the charges made. No point is made that the findings of the Civil Service Commission would not warrant the discharge of the relator. It would be a serious reflection upon the administration of justice if the courts of this county compelled the City of Chicago and the Civil Service Commissioners to reinstate the relator as a member of the Police Department of the City of Chicago. We are impressed by the charge made by the commissioner of police to the Civil Service Commission that the relator 'has reflected discredit upon the honesty and integrity of all members of the Chicago Police Department, thus making it difficult and impossible for the members of the Chicago Police Department to obtain credit for the purchase of the merchandise necessary for the proper transaction of their business as police officers in the employ of the City of Chicago, and for the support and maintenance of their homes and families.' In this connection it must be noted that the pay of a police officer cannot be garnisheed, and it is therefore necessary for the police department to insist that its members act honestly in their dealings with others.

The judgment of the Circuit Court of Cook County is reversed and the cause is remanded with directions to the trial court to dismiss the petition for mandamus.

Judgment Reversed and Cause Remanded
With Directions.

Sullivan and Friend, JJ., concur."

In *People v. Altman*, 382 Ill. 156, the Supreme Court in affirming the judgment of the Appellate Court in 314 Ill. 194 held:

"The petition discloses the charges preferred against Elmore were that he violated sections 3 and 33 of rule 389 of the police department of the city of Chicago. The charge as to the section 3 was that he was guilty of conduct unbecoming a police officer and as to section 33 that he

neglected to pay, within a reasonable time, indebtedness incurred while in the service of the police department. The specifications which formed a part of the charge set forth the names and addresses of Elmore's creditors and the amount due each. It was alleged that the claims were meritorious, that they had not been paid, that Elmore had no valid reason for such neglect and that such conduct on his part tended to impair his own efficiency as a patrolman and reflected discredit upon the honesty and integrity of all the members of the police force. In the form of conclusions Elmore pleaded that he was not guilty of any matter that would warrant his removal, that the charges were based on indebtedness when his financial circumstances prevented him from paying, that the specifications did not state in what manner he was guilty of conduct unbecoming a police officer, and that the action of the commission in finding him guilty was an unreasonable and arbitrary exercise of power not authorized by section 12 of the act. It does not appear that he made any application to the commission for a more specific statement of the charges preferred against him. Defendants answer traversed certain allegations of fact and set forth the entire proceeding had before the commission, including the substance of the evidence that was introduced. Such evidence shows Elmore's indebtedness to various persons, some of whom were those named in the specifications and that in certain instances he issued fictitious checks in payment of such claims."

* * * * *

"The judgment of the Appellate Court No. 26794 (Elmore case) reversed the judgment of the trial court awarding the writ and remanded the cause with directions to dismiss the petition. The judgment entered was proper and is affirmed but the discussion in the opinion as to the propriety of relief in a *mandamus* action is not approved."

* * * * *

"Judgment in No. 26794 affirmed" (Elmore case).

If in your opinion as head of the Department of Streets and Sanitation Mr. Bourne is guilty of conduct unbecoming an employee of the Bureau of Electricity in that he neglects to pay his debts within a reasonable time you should file charges against him with the Civil Service Commission setting out all just debts he owes and his neglect to pay them.

SENIORITY AS AFFECTED BY SUSPENSION

(First Deputy Commissioner of Streets and Sanitation—C. H. L.—April 13, 1962)

We acknowledge receipt of your letters of January 22, 1962 and February 6, 1962, on the above subject.

In your letter of January 22, 1962 you ask our opinion on the following:

"May the Department suspend operations for a short period of time, usually a few days but certainly less than 30 days, affecting forces without regard to Civil Service Seniority."

and in your letter of February 6, 1962 you say:

"Reference is made to our letter dated January 22, 1962 and your reply dated January 25, 1962, same subject. To further clarify our request, it was intended to obtain your opinion on the question in general, rather than as applied to certain individuals. Our work crews are organized into task forces on a functional basis, and when weather, limited funds or other reasons indicate that work should be suspended for a short

period of time, the employment of corresponding task forces is also suspended.

It is not considered practical or efficient to organize our forces based on Civil Service seniority only. Hence, when work is suspended for these short periods, it may happen that persons having Civil Service seniority over others are in forces where work has been suspended. Some of these senior persons contend that work suspension should be based on Civil Service seniority only."

We understand from your letters that members of some construction crews are filling the jobs of those Civil Service employees who have been suspended from work, but you have not advised (as we requested in our letter dated January 23, 1962) as to the Civil Service status as to Class, Grade and Rank of those under suspension and of those of some construction crew (if any) who are filling the jobs.

We take it, however, that all persons involved in those suspending operations are regular Civil Service employees and have taken promotional examinations for their respective Civil Service positions.

In order to arrive at a definite understanding of the seemingly perplexing problem you are faced with, it is necessary for us to call your attention to the specific meaning of seniority and its legal application to Civil Service positions.

The courts have held that the Civil Service Commission has only such power as is given it by Statute. It operates under rules made by it under authority of Section 4 of the Cities Civil Service Act and its acts complying with the purposes of said Section are as binding on it as though made by the Legislature. *People ex rel. Berquist v. Gregory*, 337 Ill. App. 661 (1949), *Peo. ex rel. Silbert v. Ropley*, 336 Ill. App. 205 (1948), *Lindblom v. Doherty*, 102 Ill. App. 14, 29 (1902).

In *Mulcrane v. O'Connor*, 13 Ill. App. 2d 549, the Court held at page 551:

"The Commission has statutory authority to provide by its rules for promotion on the basis of ascertained merit, seniority in service and examination (Ill. Rev. Stat. 1955, Chap. 248, par. 47, Section 9). * * *

The rules and regulations of the Civil Service Commission provide a precise method for giving credits for aptitude tests, duties, physical, seniority, and if applicable, military credits in promotional examinations."

In *Peo. v. Coffin*, 282 Ill. 699, the Supreme Court held:

"Neither the city nor the Commission, nor both combined, can legally abolish a position temporarily for the unlawful purpose of later re-establishing it and installing therein another person as employee. To permit such a course of conduct by the judgment of this court would be, in effect, to declare the civil service law a dead letter or law, enforceable only at the discretion of said city officers, whose positive duty, under the law, is to enforce it, or assist in enforcing it, according to its terms."

In an opinion we rendered on April 28, 1960, addressed to Honorable Dolores L. Sheehan, President Civil Service Commission on seniority we held:

"When we consider that the foundation principles of the Cities Civil Service Act are that appointments must be made according to merit and fitness, *Akin v. Kipley*, 171 Ill. 44 (1898), *McSweeney v. Collins*, 276 Ill. App. 1 (1934) and that the object of said Act is to increase the efficiency of the public service to the end that public safety may not be imperiled, *Peo. v. Sterncson*, 270 Ill. 569, 573 (1915), it is, in our opinion, evident

that the legislature intended to make it mandatory on the Civil Service Commission to provide by its rules for promotion on the basis of ascertained merit and seniority in service."

In our opinion No. 8777, Vol. XVIII, p. 196 we held:

"The Civil Service Act relating to cities is a part of the contract of employment of every civil service employee, and such an employee can only be removed from his position permanently or temporarily in the manner provided for by section 12 of said act, which requires a hearing on charges preferred."

In our opinion No. 6973, Vol. XVIII, p. 174 of the Corporation Counsel's opinions, dated June 26, 1930, we held as follows:

"Seniority consists of two elements, first, the date of one's original entrance into the classified services by certification and appointment; second, the actual duration of time spent in that service. Upon these two facts, the law operates to establish a vested right to seniority in every Civil Service appointee as against any power of the heads of departments and the Civil Service Commission to abridge or curtail such right." * * *

You are, therefore, advised that, in our opinion, it is your duty to always use seniority as one of the factors to be considered in appointments to fill temporary vacancies such as those here under consideration.

SICK PAY

(*Purchasing Agent—J. O. T.—October 30, 1962*)

In your letter of October 22, 1962, which was originated by E. J. Mulvill the Assistant Purchasing Agent, you asked whether or not an employee holding a particular position was entitled to sick pay. The position was that of a printer in the Department of Purchases on Contract Basis. The classification code was 6765, and appears in the annual appropriation ordinance for 1962 at page 6041 Journal of Council Proceedings, December 7, 1961, wherein it is indicated that the printer is paid a weekly salary for 52 weeks. Your question is prompted by whether or not the position should be considered a *per diem* position, and not entitled to sick leave, or treated as any employee on a monthly salary. According to Section E (3) of the Compensation Plan for City Employees established for the year 1962 (C. J. 6552-6556)

"... each salaried employee in a classified position under the jurisdiction of the Civil Service Commission or in a position in the exempt offices may be given sick leave with pay for periods not exceeding twelve (12) working days in the aggregate during each calendar year, on account of sickness or related cause for absence which may be considered by the department head a sufficient and legitimate excuse for the employee's failure to be present and in attendance upon his duties . . ."

The criteria under which the subject position falls for entitlement to sick leave is whether or not it is a classified position.

Under the Cities and Villages Act, Ill. Rev. Stat. 1961, ch. 24 § 10-1-3, the Civil Service Commission "... shall classify all the offices and places of employment hereinafter provided for, except those offices and places excluded by Section 10-1-17. The offices and places so classified by the Commission shall constitute the classified Civil Service of such Municipality". The position of printer in the above department is not an excluded position under § 10-1-17 of

the Cities and Villages Act. Accordingly, the Civil Service Commission of the City of Chicago has classified the job in question in its Civil Service Commission Classification Plan under No. 6700 (miscellaneous industrial trade series). This is also in accord with Rule 1, Section 2(G) of the Rules of the Civil Service Commission in effect September 5, 1962 which defines classified position as "... all positions except those specifically exempt from the jurisdiction of the Civil Service Commission by law."

Since the position in question is a classified position under the jurisdiction of the Civil Service Commission, and since it is salaried, the employee holding such position qualifies for sick leave under the resolution of the City Council passed December 27, 1961 and appearing at page 6555 in the Journal Council Proceedings.

PARDON'S EFFECT ON CIVIL SERVICE HEARING

(Civil Service Commission—S. R. D.—November 15, 1962)

We acknowledge receipt of your letter of November 8, 1962, requesting an opinion as to whether a Presidential Pardon bars the Commission from proceeding with a hearing in the above matter.

Your file discloses that in a jury trial before Judge Joseph Sam Perry, James Aman was found guilty of unlawfully and knowingly having in his possession and knowingly transporting four hundred cases of Seagram's Seven Crown whiskey in interstate commerce (*United States of America v. James Aman*, No. 52 CR 321, in the United States District Court, Northern District of Illinois, Eastern Division). The file contains a photostatic copy of a Presidential Pardon granted James A. Aman on June 19, 1962. The facts and circumstances under which the pardon was granted are not disclosed.

Counsel for Sergeant Aman contends that the Presidential Pardon bars further action by the Commission.

In 67 C. J. S., Pardons, 1950, Section 11, pp. 576-578, the effect of a pardon is stated as follows:

"It has been stated that the effect of a full pardon is to make the offender a new man, and that a full pardon blots out the existence of guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. However, these statements, characterized as generalizations, have not been universally accepted, recognized or approved. *Moreover, a pardon does not so operate for all purposes, whether the pardon is, or is not, based on the innocence of the prisoner; since as the very essence of a pardon is forgiveness or remission of penalty, a pardon implies guilt; it does not obliterate the fact of the commission of the crime, and the conviction thereof; according to the judicial decisions on the question it does not wash out the moral stain; as has been tersely said it involves forgiveness and not forgetfulness.*" (Emphasis added.)

In *State ex rel. Attorney General v. Irby*, 81 S. W. 2d (Ark., 1935) 419, Cert. denied, *Irby v. State of Arkansas ex rel. Attorney General*, 56 S. Ct. 136, 296 U. S. 616, 80 L. Ed. 437, the court held that a person convicted in a federal court of embezzlement of monies belonging to the United States was ineligible to hold the state office of county judge, notwithstanding a full presidential pardon after serving his term since the pardon restored merely his civil rights as distinguished from political privileges (saying, p. 424):

"We think it self-evident that the issuance and acceptance of a pardon within its self irrevocably acknowledges a conviction of the crime pardoned and has the effect only of restoring civil rights as distinguished from political privileges."

In *Mason v. State*, 103 So. 2d (Ala., 1956) 337, affirmed 103 So. 2d 341, Cert. denied, 79 S. Ct. 323, 358 U. S. 934, 3 L. ed. 2d 306, the court said (p. 340):

"Instead of blotting out of existence the guilt of an offender, the very acceptance of a pardon is an implied acknowledgment of guilt. *Burdick v. United States*, 236 U. S. 79, 35 S. Ct. 267, 59 L. Ed. 476. As stated in *People ex rel. Prisament v. Brophy*, 287 N. Y. 132, 38 N. E. 2d 468, 471, 'Absolution, by temporal authority, for an offense implies, perhaps, that there is reason to believe the rigid enforcement of the usual penalty for the offense would work injustice.' A pardon cannot wipe out the historical fact of the conviction, and as appropriately stated by one court, it involves forgiveness, and not forgetfulness. *State ex rel. Atty. Gen. v. Irby*, 190 Ark. 786, 81 S. W. 2d 419."

In *People ex rel. Prisament v. Brophy*, 38 N. E. 2d (N. Y. 1941) 468, the court after a thorough research of the effect of a presidential pardon, said (pp. 470-471):

"Literally, of course, an executive pardon cannot 'blot out of existence the guilt' of one who committed a crime. At most it can wipe out the legal consequences which flow from an *adjudication* of guilt. In *Ex parte Garland*, supra, the court gave to the presidential pardon no greater effect. The court decided only that 'the effect of this pardon is to relieve the petitioner from all penalties and disabilities attached to the offence of treason, committed by his participation in the Rebellion. So far as that offence is concerned, he is thus placed beyond the reach of punishment of any kind.' 4 Wall 381. To illuminate a decision in which a bare majority of the court concurred and which was rendered while the passions roused by the rebellion still clouded the judgment of most citizens, the court used, appropriately enough, a metaphor; but metaphors cannot appropriately be used to justify a conclusion which would follow logically only if the metaphor were not a figure of speech but an accurate description. The logical difficulties which must follow if the metaphor used by the court in *Ex parte Garland* were accepted as a premise from which legal consequences inexorably follow are made manifest by what was said and decided by the court in *Matter of*, an Attorney, 86 N. Y. 563, especially at page 569.

"The Supreme Court of the United States, indeed, has itself rejected the implications lurking in the metaphor it used in *Ex parte Garland*. In *Burdick v. United States*, 236 U. S. 79, 90, 35 S. Ct. 267, 269, 59 L. Ed. 476, the court pointed out that, far from wiping out guilt, the acceptance of an executive pardon may imply a confession of guilt. 'Escape by confession of guilt implied in the acceptance of a pardon may be rejected,—preferring to be the victim of the law rather than its acknowledged transgressor,—preferring death even to such certain infamy.' The President is empowered 'to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.' U. S. Const. art. 11, § 2. Neither Congress nor a State Legislature can limit the constitutional power of the President to exempt an offender from punishment for his offense (*Ex parte Garland*, supra); but the State may still provide that in fixing the penalty for an offense against the sovereign State, the offender's past conduct, including the commission of an offense against another sovereign, may be taken into account even though the offender has been pardoned by such other sovereign. The Constitution, which confers upon the President the power to pardon, does not confer upon him power to wipe out guilt. In measuring the punishment of a person who is convicted of an offense against this State, after he has been convicted of an offense against the United States, the State may determine as it sees fit both the effect that shall be given to the previous conviction and the effect that shall be given to a presidential pardon for that offense."

and further (p. 472) :

"We conclude that a presidential pardon, even if granted because the President is satisfied that the convicted person is innocent, is an act of grace which does not obliterate the finding of guilt."

Judge Perry, in his letter of June 19, 1956, addressed to the Department of Justice, Pardon Attorney, Washington, D. C., relative to the granting of a pardon to James Aman, said :

"This case was tried before me with a jury, and I was not convinced of Aman's guilt. The record will show that on the motion for a new trial I stated that I did not believe that I would have found the defendant guilty, under the evidence as presented, had the matter been tried without a jury; that it was a pure question of fact; that there was sufficient evidence to support the jury's verdict; and that therefore I would not overturn it and grant a new trial."

In light of the foregoing, it is apparent that the presidential pardon does not eradicate the acts of Aman or the guilty judgment.

Even if Aman should have been found Not Guilty, the Commission would not be barred from proceeding with the hearing.

In *Cope v. Steckel*, 39 P. 2d (Cal., 1935) 482, the court said (pp. 482-483) :

"Appellant first contends that the police board of inquiry erred in refusing to admit in evidence at the hearing before it the transcripts of the preliminary examination and trial of appellant on the felony charges. He does not assert that testimony of any witness produced on his behalf was excluded, nor does it appear from his brief what evidence was thus omitted or in what manner it would be material. It is not suggested that said board was unaware of appellant's acquittal; but, even if these transcripts were offered for the purpose of establishing such fact, they would not be binding upon the board with regard to its conclusion at the hearing which it was then conducting. *Tapley v. Abbott*, 111 Cal. App. 397, 295 P. 911."

In *Simpson v. City of Houston*, 260 S. W. 2d (Tex., 1953), 94, the court said (p. 97) :

"We overrule appellant's third point. This procedure is a civil suit. The fact that appellant was acquitted upon the trial of the charge of bribery in a criminal prosecution cannot be urged as conclusive in his favor in this civil procedure, whether as *res adjudicata* or estoppel by judgment. See *Pittman v. Stephens*, Tex. Civ. App., 153 S. W. 2d 314."

In *People ex rel. Jones v. Civil Service Commission* (1958), 17 Ill. App. 2d 36, the court affirmed the striking of plaintiff's name from the eligible list by the Civil Service Commission after a hearing even though the record showed that Jones had been discharged in the criminal proceeding (pp. 39, 41).

In light of the foregoing, it is our opinion that the Presidential Pardon does not bar the Civil Service Commission from proceeding with the hearing to determine whether Sergeant Aman is guilty of conduct unbecoming a police officer.

EFFECT OF PRIOR INJURY ON SUSPENSION

(*Superintendent of Police—C. H. L.—November 18, 1962*)

We note from your communication dated October 23, 1962, that Sergeant Henry Davis was suspended from duty on February 13, 1962, that charges were preferred against him, that a hearing was held before the Police Board, which resulted in a decision that he be discharged from the Chicago Police Department on or about September 10, 1962, also that no Personnel Order has been issued by the Superintendent of Police.

Here we wish to inform you that in the case of *Windle v. Wilson*, No. 61 C 8916, referring to Personnel Order No. 61-329 Judge Charles S. Dougherty of the Circuit Court in his order held:

"The discharge of plaintiff by Personnel Order No. 61-329 of July 18, 1961 in so far as it purported to make plaintiff's discharge effective of June, 1961 was and is illegal and void, in that the Superintendent of Police is without power or authority to enter retroactive or *nunc pro tunc* orders."

with which order we agree.

Sergeant Davis has therefore not been separated from the Police Force.

We also note that Davis was injured by gunfire while in performance of police duty on May 1, 1961, and that he has been on the medical role ever since; that he has undergone several operations and periods of hospitalization and will need at least one additional operation to remove pins from his injured leg which are holding pieces of fractured bone in place.

Coming now to the three questions you propounded:

1. Answering this first question please be advised that the Municipal Code of Chicago provides as follows:

"11-45 that any member of the police department receiving injury or becoming disabled while in the discharge of police duties and by reason of, or as a consequence of, the performance of such duties, so as to prevent him from attending to his duties as such member of the police department, shall, for the space of twelve months, provided his disability shall last that time, or for such portion of twelve months as such disability shall continue, receive his usual salary."

You could not therefore by suspension deprive him of his right to receive his usual salary for the period of twelve months.

2. Answering your question no. 2 please be advised as follows:

Section 12 of the Cities Civil Service Act provides in part as follows:

"Section 12. * * * Such charges shall be investigated by or before said civil service commission, or by or before some officer or board appointed by said commission, to conduct such investigation. The finding and decision of such commission or investigating officer or board, when approved by said commission, shall be certified to the appointing officer, and shall forthwith be enforced by such officer. * * *"

The fact that the Police Board has ordered his dismissal and that no Personnel Order has been issued by the Superintendent of Police discharging him from the Police Force, therefore does not deprive him from his status as a patrolman and he is legally entitled to receive pay during the period of disability.

3. Answering your question no. 3 please be advised as follows :

In an opinion rendered by this department on July 6, 1932, No. 7639, Vol. XVIII of Corporation Counsel's opinions p. 146, we held :

"Injuries occurring in the course of and arising out of the work of a policeman are injuries occurring in the performance of act or acts of duty and policemen so injured are entitled to medical care and the support of their families."

in which opinion we now concur.

The Municipal Code of Chicago provides as follows :

"Medical and Hospital Care.

22-18 Whenever the city council shall appropriate a sum or sums of money for the payment of medical care and hospital treatment in case of an accident resulting in an injury to or death of a policeman or fireman employed by the city while in the performance of his duties, in accordance with the provisions of an act of the general assembly entitled 'An Act authorizing cities and villages to provide for the payment of allowance of money to the families or dependents of policemen and firemen killed or fatally injured while in the performance of their duties and authorizing such cities and villages to provide medical care and hospital treatment in case of accident to policemen and firemen,' approved June 27, 1921, as amended, the same shall be paid, disbursed and recouped in accordance with the following provisions.

22-19 The committee on finance of the city council is hereby authorized, directed and empowered to provide for payment for proper medical care and hospital treatment for accidental injuries sustained by any policeman or fireman, while in the performance of his duties, and to that end may recommend to the city council the authorization for payment of any such necessary expenses.

22-20 It shall be the duty of the Commissioner of police in the case of a policeman, and of the fire commissioner in the case of a fireman, upon the occurrence of any accidental injury in the performance of duty, to have immediate medical care and hospital treatment given to such policeman or fireman; to make or cause to be made a complete and careful investigation of all facts surrounding the occurrence; to obtain the statements of all material witnesses; and to present a report thereof without delay to the said committee on finance for consideration and action thereon, which consideration shall include the determination by said committee as to whether or not such injury was occasioned by the negligence of any other person or by any agent or servant of such other person. Such report shall show the actual date and hour of the injury, the place of occurrence, the names and addresses of witnesses, and the apparent nature and extent of the injury. Such report shall also show all items of expense, with bills attached, together with a certificate by the chief physician of the department concerned as to the reasonableness of charges made for the services rendered, and the recommendation of the head of the department concerned as to payment of such items of expense by the City.

22-21 In the event that the said committee on finance is of the opinion, from all the facts and circumstances presented to it in the said report or otherwise ascertained by it, that such injury was occasioned by the negligence of some other person, or by the negligence of any agent or servant of such other person, the committee on finance shall so notify the corporation counsel; and it shall be the duty of the corporation counsel forthwith to demand from such other person reimbursement for the amount expended by the city for the necessary medical care and hospital treatment of such policeman or fireman; and in default of payment or such amount so expended, the corporation counsel shall institute proceedings to recoup for the city the amount so expended, as provided in the aforesaid act of the general assembly.

22-22 No payment shall be made under the provisions hereof unless satisfactory proof shall have been presented to said committee on finance that such injury was sustained by such policeman or fireman while in the performance of his duty."

It is apparent from your communication that the injuries suffered by patrolman Davis arose out of and in the course of his employment and that the medical and hospital services were for his injuries and not for any sickness.

It is therefore our opinion that you should take this matter up with the Committee of Finance of the City Council under the provisions of Section 22-19 of the Municipal Code hereinabove cited.

CLASSIFICATION AFTER PERMANENT SEPARATION

(Civil Service Employee—C. H. L.—April 29, 1963)

We acknowledged receipt of your letter of April 25, 1963, addressed to Honorable John C. Melaniphy, 511 City Hall in which you state that you worked as a civil service employee from 1953 to 1958, and that you resigned in 1958.

You now say that you are working as a Welfare Assistance Worker, and you have asked the Civil Service Commission if you could get seniority rating and transferred to another department of the City or County after taking the proper civil service examination, and that Mr. James Osborne, Secretary of the Civil Service Commission has referred you to the Law Department.

Answering your query, we regret to inform you, that you having resigned your civil service position in 1958, the answer will be found in the Opinions of the Corporation Counsel, Volume XVIII, opinion No. 6973, page 174 in which we held that :

"The status of a person who has been permanently separated from the Civil Service is the same as if said person had never entered the service."

You cannot therefore be entitled to any seniority rating for the years 1953 to 1958.

NON-TEACHING EMPLOYEES

(President, Civil Service Commission—C. H. L.—May 20, 1963)

We acknowledge your communication of May 16, 1963, in which you ask whether non-teaching employees under a Board of Education proposed manpower developing and training program will come under the jurisdiction of the Civil Service Commission relative to classification and examination.

Chapter 122 of the 1961 Illinois Revised Statutes provides in paragraph 34, section 13, p. 2034 :

"The appointment and removal of the general superintendent of schools, the heads of other general departments now in existence or hereafter established, the attorney, and all assistant attorneys shall not be subject to the civil service law."

and in paragraph 34, section 15, p. 2035:

"Pursuant to the provisions of the Civil Service Law the board may appoint, or provide for the appointment of, such other officers and employees as it deems necessary, except as otherwise provided herein * * *. This section does not apply to teachers."

From the above quoted Sections of Chapter 122 of the Revised Statutes, 1961, it is apparent that all other officers and employees, except those mentioned in said paragraph 34 of the Chapter if appointed, which includes non-teaching employees, will be considered employees of the Board of Education and will come under the jurisdiction of the Civil Service Commission relative to classification and examination.

MENTAL HYGIENE PROGRAM EMPLOYEES

(President, Civil Service Commission—C. H. L.—August 6, 1963)

We acknowledge receipt of your letter dated June 17, 1963, in which you advise that the Mental Hygiene Program conducted by the Board of Health is jointly financed by the City of Chicago and the State of Illinois, and you ask whether the employees in this Program are exempt or subject to the Civil Service Act.

We have been informed by Mr. Otto H. Loser, First Deputy Comptroller that there are ten employees on payroll number 2536 and that the entire payroll is charged to fund No. 618 which is reimbursed by the State Welfare Department, which in turn receives for distribution federal funds.

It is our opinion that these employees who are paid by the City, notwithstanding the fact that the City will be reimbursed as aforesaid, must be considered employees of the City of Chicago, wherefore it is the duty of the Civil Service Commission to classify them under the provisions of Section 3 of the Cities Civil Service Act which reads:

"Section 3. Classification. Said commissioners shall classify all the offices and places of employment in such city with reference to the examinations hereinafter provided for, except those offices and places mentioned in Section 11 of this act. The offices and places so classified by the commission shall constitute the classified civil service of such city; and no appointments to any of such offices or places shall be made except under and according to the rules hereinafter mentioned."

MILITARY CREDIT USED FOR PROMOTIONS

(Secretary, Civil Service Commission—S. R. D.—March 6, 1964)

We acknowledge receipt of your letter of March 5, 1964 stating that Joseph H. Jankowski and Raymond T. Luedtke, Firefighters, "claimed Military Preference on Promotional examinations for Fire Engineer, Lieutenant and Captain." Attached to your letter is a schedule showing that Joseph H. Jankowski and Raymond T. Luedtke received military credit for each of the examinations of Fire Engineer, Lieutenant and Captain in apparent violation of Section 10-1-16 of the Municipal Code 1961 (Ill. Rev. Stat. Ch. 24, par. 10-1-16) which provides, in effect, that no person shall be given additional military credit after "he has received one promotion from an eligible list on which he was allowed" military credit.

You request our opinion as to whether the above mentioned persons can "continue in the rank of Captain after using their military points on the examinations for Fire Engineer, Lieutenant and Captain?"

In the case of *People ex rel. Hurley v. Graber* (1950), 405 Ill. 331, the Civil Service Commission attempted to demote certain civil service employees who received their appointment after the addition of credits for military service under a void and unconstitutional act. The court held that the Civil Service Commission lost all jurisdiction over a promotional civil service employee after he has been certified and appointed, saying (pp. 343-344) :

"The City Civil Service Act contains no provision granting power to the civil service commission to reconsider an appointment or to demote for cause after the employment or appointment is completed, as here, by the act of the commissioner of police in making an appointment upon certification by the commission of the applicants having the highest grading or rating. * * * The commission certified these plaintiffs to the commissioner of police as having the highest rating as applicants for the positions to which they were appointed, took them from the registers for their respective grades or class of positions, their grades were determined by adding credits for military service, and the commissioner appointed them to their positions from the list certified by the commission to him as eligible for appointment to their respective positions. In accepting the certifications upon which they were appointed to their present positions, the plaintiffs were permanently separated from the positions formerly held by them. They could not be demoted to their former positions, not only because they had been permanently separated therefrom, in accordance with section 2 of rule IV of the commission, but for the additional reason that their former positions had been filled and occupied by others. Their appointments were then complete, and the officers vested with appointive power thereafter lacked power or jurisdiction either to reconsider the appointments or to demote the plaintiffs for the adequate reason that the statute from which the city civil service commission derive its authority does not delegate power to the commission to demote once an appointment is complete. * * *"

Likewise, in the situation now under consideration, the Civil Service Commission lost all jurisdiction over Joseph H. Jankowski and Raymond T. Luedtke after they were certified and appointed Captains in the Fire Department.

It is our opinion that the Civil Service Commission has no power to take any action in the matter.

REGULATION OF SICK LEAVE

(Commissioner of Public Works—R. N.—April 15, 1964)

Your communication of March 24, 1964 asks whether certain proposed procedure outlined therein in connection with determining an employee's right to claim sick leave for days absent is within the scope of the ordinance of February 18, 1963 as it relates to sick leave during 1964.

The provision to which you refer reads as follows :

(3) Sick Leave.

Each salaried employee in a classified position under the jurisdiction of the Civil Service Commission or in a position in the exempt offices may be given sick leave with pay for periods not exceeding twelve (12) working days in the aggregate during each calendar year, on account of sickness or related cause for absence *which may be considered by the*

department head a sufficient and legitimate excuse for the employee's failure to be present and in attendance upon his duties; provided that the reason for the absence and the good faith of the employee in making the application for such leave shall be shown to the department head by such reasonable evidence as may be required by the Civil Service Commission or by the appointing authority in exempt offices. Each salaried employee appointed after January 1 of a calendar year, shall be allowed sick leave at the rate of one day for each month of employment. (Italics ours.)

The provision quoted above specifically charges the department head with the responsibility of determining the sufficiency and the legitimacy of an employee's cause for absence, and, in our opinion, any reasonable regulations which a department head deemed necessary for making such determination would be considered within the terms of the provision.

EFFECT OF ABSENTEEISM

(Commissioner of Aviation—J. J. T.—September 3, 1964)

On August 17, 1964, you wrote us requesting assistance in the preparation of charges of misconduct which you contemplated filing against the subject employee before the Civil Service Commission.

From the attachments to your request it appears that your First Deputy, Mr. J. P. Durne; advised Jackson by letter of April 13, 1964, that his absenteeism would no longer be tolerated and continuance thereof would result in a suspension. On July 22, 1964, Mr. Durne suspended Jackson for 29 days and stated in his letter of that date that Jackson was to report back for work on August 20, 1964. Since the work record, which you have attached, shows that Jackson had no absences after April 13, 1964, we conclude that the 29 suspension was administrative punishment for absences prior to that date. Mr. Durne's direction to report back to work at the end of the suspension period further indicates that the department chose to adopt suspension, rather than the filing of charges for dismissal from the service, as the disciplinary measure to be taken.

A Civil Service employee may not be punished twice for the same infraction. You have elected to use a 29 suspension for the past absences. Because of the fact that no additional absences have occurred since April 13, 1964, it is our opinion that you may not at this time initiate any further action against the subject employee. In the event he fails in his duties in the future, you will at that time have the right to either suspend him pending the filing of charges, or to suspend him for a fixed period of time not to exceed 30 days.

PREFERENCE FOR MILITARY SERVICE

(President, Civil Service Commission—J. J. T.—September 11, 1964)

You request our opinion as to the type or character of service in the military for which you should grant preference in relation to original or promotional Civil Service examinations.

Chapter 24, Section 10-1-16, Ill. Rev. Stat. 1963, provides for Civil Service preference for all persons who were engaged in or who volunteered for or were called to "—the military or naval service of the United States—" during specified periods of times in which this country was engaged in armed conflict. Those periods pertinent to this inquiry are September 16, 1940 to July

25, 1947 (World War II) and June 25, 1950 to January 31, 1955 (The National Emergency). As to those Civil Service employees or applicants who served on fulltime active duty, in the armed forces, there is no question concerning their entitlement to preference. It is with those individuals who participated in the Reserve Forces or National Guard programs and who were not called to, or whose units were not activated into, fulltime active duty that a question arises.

By Federal Statutory definition, the term "Armed Forces" encompasses all branches of the military, including Reserve components and among the latter are included the National Guard of the several states (Title 38, section 101 & Title 10, section 261, U. S. C. A.): therefore it is not necessary to distinguish between the National Guard and the various Reserve groups in this opinion.

There have been numerous forms of Reserve programs since the termination of the Second World War. However, a feature common to many, but not all, was a commitment on the part of the enlistee to participate in training exercise, which involved short weekly drill periods or an initial full-time training assignment at a military installation for 6 months or more, or combination of all of the above requirements. Other programs required no more than the enlistment of the reservist for a specified period of time with no duty assignment or active participation whatsoever.

The Veterans Preference Act of 1944, as amended (Title 5, Section 851, U. S. C. A.) provides Civil Service preference only to those who served on *active duty* in any branch of the armed forces. Active duty is defined as "full time duty in the armed forces other than active duty for training", the latter term being defined as "full time duty performed by reserves for training purposes." (Title 38, Section 101 (20) (22) U. S. C. A.)

The term "military service" is defined in the Soldiers and Sailors Civil Relief Act (50 App. 511, U. S. C. A.) as, "federal service on active duty". It thus appears that on the federal level, the reservist who has not been called to active duty, but rather who participates only in the training programs, does not render the character or type of service which entitles him to Civil Service preference.

The Illinois statute in question does not define the term "military or naval service". However, in the case of *Dietz v. Sheehon*, 23 Ill. App. 2d 122 the court determined that a war-time inductee into the armed forces who was allowed a period of 3 weeks after being sworn in to return home and arrange his personal affairs, although not in uniform or directly under military supervision during that time, was still subject to military jurisdiction and therefore was to be considered in the military service for that period and he could therefore compute his preference credits from the day of induction rather than the day he actually arrived at his base. No further Illinois cases are of assistance in resolving this issue.

However, considering the context of the above cited Dietz opinion and recognizing that the obvious purpose of our statute is to prefer those who through military activity have made a sacrifice of their civilian time and opportunities, it is our opinion that credit is properly due those who have engaged in full-time active service whether for training purposes or otherwise. Those individuals are subject to the jurisdiction of Court Martial under the provisions of the Uniform Code of Military Justice (Title 10, section 802, U. S. C. A.).

Thus the reservist who has served in an active duty training program for any time whatsoever during the periods specified by the statute is entitled to the statutory five-point credit for an original entrance examination, and is further entitled to accumulate his total time spent on active duty training toward promotional examination credits as provided by the statute.

As to the drill periods for an hour or two which a reservist attends on a weekly basis or for a full day every month, it is our opinion that these are not

to be considered as military service for the purpose of credits. These periods have been defined as "inactive duty training" in the case of *The Petition of George La Plata*, 174 F. Supp. 884. The Uniform Code of Military Justice (Title 10, section 802, U. S. C. A.) does not apply to the reservist while attending these drill periods unless and only until an order is given to the reservist from his superior in writing. There is therefore no character of military jurisdiction or service impressed upon these activities which, in our opinion, raises them to the status of active duty.

MEDICAL LEAVE OF ABSENCE

(President, Civil Service Commission—J. C. M.—September 23, 1964)

In your letter of September 10, 1964, you advise that a Civil Service Guard Captain at the House of Correction, with approximately 15 years service, was on a medical leave of absence from June 14, 1963 until December 16, 1963; that he received his vacation (3 weeks) in 1963; and that he has worked all of 1964, to date. You inquire as to his right to a 3 week vacation in 1964. Under Section G(2) of the Compensation Plan for City Employees established for the year 1964 (Council Journal, December 18, 1963, Pages 1983-1984-1985) provides:

"(a) Each salaried or hourly rate employee who occupies a position in a classified service will be granted a vacation with pay of 2 calendar weeks (10 work days) after he has completed his first full year of service, provided that one week (5 work days) of the initial vacation allowance may be allowed after the first 6 months of service * * * Each salaried or hourly rate employee who has served the city 10 years, or more, shall be granted a vacation of 3 calendar weeks (15 work days) in each calendar year."

We assume that this extended sick leave in 1963 met with the approval of the Civil Service Commission, the Committee on Finance of the City Council, the Comptroller and the Department Head. It further appears that said employee has been working all of 1964, to date. When he received his vacation period in 1963, that vacation was earned in 1962. The vacation that the employee wants to take during this year is for the service rendered during the year of 1963. The fact that he has a medical leave of absence is not in itself a termination of all rights for compensation as an employee and it is our opinion that the employee is entitled to a 3 week vacation during 1964.

AMENDMENT TO MILITARY PREFERENCE PROVISIONS

(Civil Service Commission of Chicago—J. J. T.—December 31, 1964)

In your letter of 12/11/64 you request our opinion relative to the granting of military preference to those persons whose names appear on existing Civil Service lists posted prior to 1963 and who have not made application for such preference prior to that time. You enclose with your request a letter to you from Attorney Thomas J. Duffy who requests your decision on this matter on behalf Fire Lieutenant Raymond G. Arff whose name presently appears on the Fire Captains' list posted 12/9/59.

Prior to the passage of House Bill No. 774 on 6/13/63, Section 10-1-16 of Chapter 24 (Municipal Code 1961) I. R. S. 1961, provided:

"—(Military preference) shall be given after the posting or publication of any eligible list or register resulting from said examination. An eligible entitled thereto may claim such credit for such military preference at any time while the list is in effect." (Emphasis added.)

With the passage of the said bill, section 10-1-16 was amended so as to allow preference only if a claim is made "*—before any certifications or appointments are made from such eligible list or register.*" (Emphasis added.)

The question which arises concerning pre-1963 lists is whether the said Amendment is to be construed as retroactive and thus foreclosing those who failed to make a preference claim prior to 6/13/63 from now doing so, or whether it is prospective legislation and thus relating only to those lists posted thereafter.

Volume 34, Illinois Law and Practice, ch. 6, section 193, provides:

"A retroactive or retrospective law, in the legal sense is one which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes new duty, or attaches a new disability in respect of transactions as considerations already past. —Retroactive legislation is not favored. Statutes generally will not be construed retroactively unless it clearly appears that such was the legislative intent. A presumption exists that the General Assembly intends that statute operate prospectively only and not retroactively, and in the absence of express language declaring otherwise, they will not be given a retroactive operation unless the language of the statute is so clear as to admit of no other construction."

There being no language in the subject statute which would indicate it is to operate retroactively, it is our opinion that claims for military preference must be allowed so long as the lists in question are in effect.

EMPLOYEES PAID FROM FEDERAL GRANTS

(Acting City Comptroller—G. F. M.—January 25, 1965)

In response to your request for an opinion concerning certain employees whose salaries are or will be paid from Federal Grants, the following is submitted:

Your letter indicates that the City of Chicago has been awarded a number of Federal Grants given for such purposes as Chicago Juvenile Delinquency Prevention (Youth Development Committee), the Department of Health, such as the V. D. Program, and for Air Pollution Control; that the salaries for the employees in project covered by these grants are not provided in the annual Appropriation Ordinance, but are paid from the funds supplied to the City of Chicago by the Federal Government.

An investigation into the various aspects of these projects indicates that the City Council does not make appropriations for the specific positions occupied by these employees as they do in the case of other City employees. It also indicates that the Civil Service Commission maintains regular records of the employment of persons holding positions under such projects and that such employees positions are classified as to grade and salary, although there are a few employees in these projects whose salaries are not fixed. The employees concerned are under the control and direction of the heads of the various departments under which classification the project falls; for instance, the employees who are working on the projects sponsored by the Federal Government which are paid for by the Federal Grants made to the Department of Health are under the head of the Department of Health and subject to his control and jurisdiction.

It is my understanding that the City of Chicago, through the head of the Department which supervises these projects, controls not only the salaries paid to these individuals, but also their employment and the work which they

perform. It is further my understanding that the funds received from the Federal Government for these projects are paid to the City Treasurer of the City of Chicago, who then deposits the money received in a separate account for each such project; that the employees concerned in the project are issued paychecks from a regular payroll (with the exception of those few employees who are paid by vouchers), and that the funds on which these checks and vouchers are drawn are City Funds; that the account on which these checks are drawn is then reimbursed by the City Treasurer in an amount commensurate with that which is necessary to pay such checks; and that the balance of the funds received from the Federal Government remains in the separate account in which it has been placed.

In an opinion written by this office dated September 9, 1960, it was held:

"It is our opinion that they (Janitors and maids employed by the Conservation Board under the Hyde Park Kenwood Urban Renewal Plan) cannot be classified as independent contractors for the reason that the Conservation Board retains supervision over the performance and execution of their work and it also retains the right to give orders to said janitors and maids from time to time, as in the opinion of the superintendent or manager of the building may deem necessary"

"In view of the above we take the position that the janitors and maids employed by the Conservation Board * * * must be classed as temporary city employees * * *"

In an opinion written March 23, 1961, there appears the following:

"Please be advised that notwithstanding the fact that the community renewal program will be partially sponsored by a Federal Grant, the persons employed in this program must be considered City employees and are subject to the provisions of the City Civil Service Act".

In an opinion written by this Department on August 6, 1963, there appears the following:

"We have been informed by Mr. Otto H. Loser, First Deputy Comptroller, that there are ten employees on payroll No. 2536 and that the entire payroll is charged to fund No. 618, which is reimbursed by the State Welfare Department, which in turn receives for distribution federal funds.

"It is our opinion that these employees, who are paid by the City, notwithstanding the fact that the City will be reimbursed as aforesaid, must be considered employees of the City of Chicago, wherefore it is the duty of the Civil Service Commission to classify them under the provisions of Section 3 of the Cities Civil Service Act which reads":

"Section 3. Classification. Said commissioners shall classify all the offices and places of employment in such city with reference to the examinations hereinafter provided for, except those offices and places mentioned in Section 11, of this Act. The offices and places so classified by the commission shall constitute the classified civil service of such city; and no appointments to any of such offices or places shall be made except under and according to the rules hereinafter mentioned".

Section 11 of this Act, now Section 10-1-17 of the Illinois Municipal Code (Ill. Rev. Stats. 1963, Chap. 24, Section 10-1-17) provides, in part thereof, as follows:

"Section 10-1-17. Exemptions from classified service. Officers who are elected by the people, or who are elected by the corporate authorities pursuant to the municipal charter, or whose appointment is subject to confirmation by the corporate authorities, judges of election, members of any board of education, the superintendent and teachers of schools, the employees of any welfare department, heads of any principal department.

police officers above the grade of captain, police cadets, a health officer appointed after July 1, 1953, seasonal employees, which means those persons whose employment does not exceed 90 days in any calendar year, * * * shall not be included in such classified service * * *".

As these employees are under the control and direction of the City of Chicago, by and through the Department heads which supervise the project on which they are employed, and as they are paid with City money, even though such money is reimbursed to the City from Federal Grants, and, further, since these employees are classified as to grade and position by the Civil Service Commission and, with the exception of a few instances, their salaries are fixed according to such grade and rank, and because such employees, with the exception of a few, are carried on the payrolls of the City of Chicago and paid by city check, we are, therefore, of the opinion that these employees are City employees and entitled to receive all the rights and privileges extended to other City employees, including therein membership in the various Annuity and Benefit Funds of Chicago, upon their meeting necessary qualifications of the Act governing the particular Fund in which their type of employment entitles them to participate.

We are further of the opinion that employees who are presently members of an Annuity and Benefit Fund and are transferred from the regular City rolls to these projects would continue their membership in that Fund.

HOLDING TWO CITY JOBS

(Surgeon, Police Department—E. W. P.—August 16, 1965)

We acknowledge receipt of your recent letter advising that you are employed full time by the Chicago Police Department of the City of Chicago as a Surgeon. You also advise that you were employed by the Board of Health of the City of Chicago as a Physician on a part-time basis during the same period of time of your employment by the Chicago Police Department. You state that you have resigned the latter position since this employment is contrary to the Budgetary Directive, but you state in your letter you understand that a precedent has been set to permit this dual type of employment with the City in view of the fact that the working hours do not interfere with one another. You request our written opinion. It has been the opinion of the Corporation Counsel over a period of many years that one cannot hold two positions with the City of Chicago at the same time and this has been our ruling regardless of whether or not the working hours of one position interfere with the working hours of the other position. This opinion is based on a sound public policy and there are no deviations.

You also advised the writer over the telephone that the current payment of your salary has been withheld by the Chicago Police Department on account of this situation. It is our opinion that you are entitled to receive your salary for the work that you have performed to date, both with the Board of Health and the Chicago Police Department, on a quantum meruit basis because of your actual performance of services while you were acting innocently and on an erroneous supposition. We are transmitting copies of this letter both to Hon. O. W. Wilson, Superintendent of the Police Department, and Hon. Samuel L. Andelman, Commissioner of Health, Chicago Board of Health.

TIME ALLOWED FOR SICK LEAVE

(President, Civil Service Commission—R. S. C. & S. R. D.—August 18, 1965)

In your letter of July 30, 1965 you raise the question of whether a "department head can credit an employee on the basis of one day sick leave for each month of service" or whether "an employee is entitled to twelve days sick leave at the beginning of the calendar year?"

In the "Compensation Plan for City Employees Established for Year 1963", Journal of Council Proceedings 1962-1963, December 27, 1962, pp. 8867, 8871, it is stated:

"Each salaried employee in a classified position under the jurisdiction of the Civil Service Commission or in a position in the exempt offices may be given sick leave with pay for periods not exceeding twelve (12) working days in the aggregate during each calendar year, on account of sickness or related cause for absence which may be considered by the department head a sufficient and legitimate excuse for the employee's failure to be present and in attendance upon his duties . . ."

In the "Compensation Plan for City Employees Established for Year 1964", Journal of Council Proceedings 1963-1964, December 18, 1963, pp. 1983, 1986, the following sentence was made part of the compensation plan:

"Each salaried employee appointed after January 1 of a calendar year shall be allowed sick leave at the rate of one day for each month of employment."

The "Compensation Plan for City Employees Established for Year 1965", Journal of Council Proceedings, December 29, 1964, pp. 4142, 4146, insofar as it relates to sick leave, is identical with the language quoted in the 1963 and 1964 ordinances. The fact that it was necessary to include the sentence especially dealing with employees appointed after January 1 indicates that prior to this provision all employees were entitled to the aggregate number of allowed sick leave days at any given time of the year.

In light of the foregoing, we are of the opinion that employees appointed after the first of the year are only entitled to sick leave on a month by month cumulative basis. After one year's employment, however, an employee is entitled to the total number of sick leave days allowed per year as of the beginning of the year.

Section B. SALARIES

DOUBLE VACATION PAY

(City Comptroller—E. W. P.—October 4, 1961)

We have your letter of September 25, 1961, in which you request an opinion on the following situation:

"A City Employee named Louella Young appeared on the Municipal Court Clerk's payroll from July 26, 1961 to August 15, 1961 being carried on vacation. Same employee started working for the Police Department on July 26, 1961, thus being paid by the City twice for this same period of time. Is this employee entitled to this money, or should she be obliged to make restitution?"

This employee is not entitled to be paid twice for the same period of time. It is our opinion that she must make restitution to the City of the amount paid to her for the period from July 26, 1961 to August 15, 1961, as vacation money on the Municipal Court Clerk's payroll.

COMPUTATION OF SALARIES

(T. L. J.—R. L. C.—February 1, 1962)

In your letter of January 22, 1962 you say that you are in the "process of designing and installing a uniform system of payroll procedures" and inquire as to whether there exists any legal objection to a proposal for "uniform rules for calculation of amounts due to salaried employees who are to be docked for absences without pay, or who work less than the full month" or more specifically you ask if you may "base all calculations of salary payments for irregular periods on the number of working days or hours rather than the number of calendar days".

The Municipal Code provides that salaries shall be fixed by the City Council in the annual appropriation ordinance and Section 25-6 then follows by saying:

"The salaries and pay of all officers or employees shall be due and payable semi-monthly to each person entitled thereto, in the manner prescribed by the rules and regulations of the department of finance".

The rates designated in the annual appropriation ordinance are on an annual basis for the regular salaried employees listed therein. That the basis is an annual one is further evidenced by Section B (6) of the Compensation Plan for City Employees—1962 (Council Journal p. 6552) which predicates the compensation of salary for part time employees upon designated percentages of the annual full time rates; by Schedules B, C and D of the appropriation ordinance which lists uniform annual rates by class grades, and by the fact that within the same ordinance when the Council intended to apply a salary basis other than annual (*i.e.* daily or hourly rate) it did so specifically. These facts all militate against any interpretation that the regular salaried employees are paid on other than an annual basis.

These employees have historically been paid one-twenty fourth of the designated annual rate by payroll checks dated on the 15th and the final day

of each month without regard to either the number of calendar or working days embraced therein. This procedure is in accordance with an opinion of the Corporation Counsel dated March 16, 1915 (8 Opinion of C. C. p. 368) wherein it was concluded :

"it follows naturally that where an ordinance specifies that salaries shall be due and payable monthly or semi-monthly, the payments contemplated are for the calendar periods named, that is to say 12 or 24 equal *installments* as the case may be, and not for an indeterminate number of days, dependent on the length of the month."

In arriving at a daily rate for the purpose of docking annual salaried employees who are "absent without pay" we suggest deference be attached to the City Council's expression in Section B (5) of the Compensation Plan for City Employees—1962 (Council Journal p. 6552) :

"rates prescribed in the salary schedules are fixed on the basis of full-time service for normal work weeks of 35 to 40 hours. . . ."

With this in mind, the annual rate would be divided by the number of working days per year, rather than calendar days, to establish a rate for docking employees which would be uniform throughout the year. This, we believe, would end the fiction that salaried employees are paid for Saturdays, Sundays or other holidays, and the procedure would be in accord with the established law of Illinois that,

"Ordinances fixing salaries are not contracts with officers for the full term of their office. The right of compensation grows out of the rendition of service and not out of any contractual relation". (*Gothmann v. City of Chicago*, 263 Ill. 292, 295.)

ASSIGNMENT OF BACK SALARY CLAIMS

(Chairman, Committee on Finance—C. H. L.—March 20, 1962)

We acknowledge receipt of your letter dated November 25, 1961 and papers attached thereto pertaining to patrolman Theodore Pappas' claim for back salary for his suspension period March 28, 1960 to April 26, 1961 in the amount of \$7,072.00.

We have examined the records of the Civil Service Commission in his Case No. 65304 and find the following entries :

March 28, 1960—Pappas suspended.

May 3, 1960—Charges filed against Pappas.

June 1, 1960—Date set for hearing.

June 1, 1960—Case cont. to July 20, 1960. Salary waiver signed by Pappas.

July 20, 1960—Case cont. to Sept. 28, 1960. Salary waiver signed by Pappas.

Sept. 28, 1960—Case cont. to Nov. 9, 1960. Salary waiver signed by Pappas.

Nov. 9, 1960—Case cont. to Dec. 14, 1960. Salary waiver signed by Pappas.

Dec. 14, 1960—Case cont. to Feb. 8, 1961. Salary waiver signed by Pappas.

Feb. 8, 1961—Case cont. to Mch. 22, 1961. Salary waiver signed by Pappas.

March 22, 1961—Case cont. to April 5, 1961. Salary waiver signed by Pappas.

April 5, 1961—Case cont. to April 26, 1961. Salary waiver signed by Pappas.

April 26, 1961—Charges dismissed.

We are of the opinion that Pappas is not entitled to back salary for the 30 day period March 28, 1960 to April 27, 1960, under the provisions in Section 12 of the Cities Civil Service Act which reads:

"Nothing in this Act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days."

He is further not entitled to salary for the period June 1, 1960, to April 26, 1961, having signed salary waivers in consideration of the continuances of his case before the Civil Service Commission as set out hereinabove.

The only period for which he would be entitled to back salary is therefore for the period following the first thirty (30) day suspension period, viz. from April 27, 1960, to the date set for hearing before the Civil Service Commission, viz. June 1, 1960, or 34 days.

Under the decisions in *Kelly v. Chicago Park District*, 409 Ill. 91 and *Nolting v. Civil Service Commission*, 7 Ill. App. 2d 147, Pappas' claim for back salary as a patrolman is limited to the difference between his back salary and what he earned in outside employment during his suspension period.

We note from a letter in your file signed by detective Theodore Pappas No. 3457 that he says:

"I would have made working as a detective on the Chicago Police Department from the 28th of March 1960 to the 26th of April \$7,072.00. While I was suspended, I worked for my Father-in-Law doing maintenance work around his building. *For my services I received a rent free apartment*".

In view of his own statement as aforesaid, his outside earnings during his suspension period amounts to more than his salary for the period April 27, 1960 to June 1, 1960 or 34 days, wherefore his claim for that salary is offset by the amount represented by his rent free apartment.

You are therefore advised that Pappas' entire claim for back salary should be denied.

We return herewith your file No. 5244 attached to your letter of November 15, 1961.

SET-OFF

(Chairman, Committee on Finance—C. H. L.—March 21, 1962)

We acknowledge receipt of your letter dated November 15, 1961 and papers attached thereto pertaining to Cornelius J. Maynahan's claim for back salary for his suspension period March 28, 1960 to April 26, 1961 in the amount of \$7,072.00.

We have examined the records of the Civil Service Commission in his Case No. 65302 and find the following entries:

March 28, 1960—Maynahan suspended.

May 3, 1960—Charges filed against Maynahan.

June 1, 1960—Date set for hearing.

June 1, 1960—Case cont. to July 20, 1960. Salary waiver signed by Maynahan.

July 20, 1960—Case cont. to Sept. 28, 1960. Salary waiver signed by Maynahan.

Sept. 28, 1960—Case cont. to Nov. 9, 1960. Salary waiver signed by Maynahan.

Nov. 9, 1960—Case cont. to Dec. 14, 1960. Salary waiver signed by Maynahan.
 Dec. 14, 1960—Case cont. to Feb. 8, 1961. Salary waiver signed by Maynahan.
 Feb. 8, 1961—Case cont. to Mch. 22, 1961. Salary waiver signed by Maynahan.
 Mch. 22, 1961—Case cont. to April 5, 1961. Salary waiver signed by Maynahan.
 April 5, 1961—Case cont. to April 26, 1961. Salary waiver signed by Maynahan.
 April 26, 1961—Charges dismissed.

We are of the opinion that Maynahan is not entitled to back salary for the 30 day period March 28, 1960 to April 27, 1960, under the provision in Section 12 of the Cities Civil Service Act which reads:

"Nothing in this Act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days."

He is further not entitled to salary for the period June 1, 1960, to April 26, 1961, having signed salary waivers in consideration of the continuances of his case before the Civil Service Commission as set out hereinabove.

The only period for which he would be entitled to back salary is therefore for the period following the first thirty (30) day suspension period, viz. from April 27, 1960, to the date set for hearing before the Civil Service Commission, viz. June 1, 1960, or 34 days.

Under the decisions in *Kelly v. Chicago Park District*, 409 Ill. 91, and *Nolting v. Civil Service Commission*, 7 Ill. App. 2d 147, Maynahan's claim for back salary as a patrolman is limited to the difference between his back salary and what he earned in outside employment during his suspension period.

We note from a letter in your file signed by detective Cornelius J. Maynahan Jr. No. 7684 that he says:

"While I was suspended I worked for the following people and made so much money

Edward J. Collins Inc., 4021 N. Elston Ave.	\$1,453.25
Flastric Neon Sign & Maintenance Co.	
3910 North Western Ave.	315.25
B. & E. Letter Service, 1416 W. Devon Ave.	199.32
	\$1,967.93"

In view of his own statement as aforesaid, his outside earnings during his suspension period amounts to more than his salary for the period April 27, 1960 to June 1, 1960 or 34 days, wherefore his claim for that salary is offset by the amount represented by his outside earnings.

You are therefore advised that Maynahan's entire claim for back salary should be denied.

We return herewith your file No. 5243 attached to your letter of November 15, 1961.

METHOD OF PAYMENT OF SALARIES

(President, Civil Service Commission—C. H. L.—March 30, 1962)

Referring to your letter dated September 5, 1961 and our answer in part to said letter dated September 28, 1961, in regard to destroying letters, we now answer the second part of your letter in which you state:

“Secondly, we are contemplating the use of IBM machines for certifying the legality of payrolls. Our present payroll cards keep a record of actual time worked by each employee. Is this necessary?

We attach hereto a copy of a letter written by Wm. S. Cochran, Assistant Budget Director on October 20, 1961, in which he says that:

“Therefore the keeping of Civil Service records of actual time worked would seem to be a duplication of the Comptroller's balanced records and serve no additional purpose”.

We therefore in answer to your above first query say that it is not necessary.

Your second query in your letter of September 5, 1961 reads:

“If we certify that the employee is legally employed under the State Statute and is being paid at the proper rate, does this meet our obligations under the law?”

We have scanned the Civil Service Act and the Rules of the Commission and found that the answer to that query is yes.

Upon reading your Regulation XI on Pay-Roll checking we suggest, however, that sections 1, 4 and 5 be revised to conform with the civil service records as computed by the IBM machine.

OVERTIME COMPENSATION FOR YOUTH WELFARE COMMISSION

(President, Civil Service Commission—J. C. M.—April 28, 1964)

In your letter of April 22, 1964, you advise that the Executive Director of the Commission on Youth Welfare has requested that you approve the payment of overtime of four of the employees of that Commission during 1963-64.

From an examination of the Annual Appropriation Ordinance relating to the Commission on Youth Welfare we find no appropriation for overtime. While Section 25-7 of the Municipal Code of Chicago fixes the amount for the payment of overtime this provision is merely establishment of rates provided there has been an appropriation therefor.

Subsequent to the passage of that section the City Council passed an order on September 10, 1948 (Council Journal, Page 2853) which instructed department heads to allow “time off” for overtime worked. That order reads as follows:

"WHEREAS, it is the policy of the City to allow compensatory time off for all necessary overtime worked by City employees; and

"WHEREAS, it has been the practice of a number of departments to permit overtime to accumulate without giving the employee time off earned by reason of overtime worked;

"THEREFORE ORDERED that department heads be and they are hereby authorized and directed to allow time off for overtime worked as soon after overtime is performed as convenient, but in any event within three months of that time."

This order is still effective.

Therefore, a department head may allow time off for the hours put in as overtime by an employee but cannot allow him overtime compensation unless there has been an appropriation made to that department for that purpose.

We are, therefore, of the opinion that you cannot certify the payroll enclosed with your letter for payment.

OVERTIME COMPENSATION

(Acting City Comptroller—S. R. D.—March 2, 1965)

You have orally stated that Maurice Callahan, Chief Operating Engineer at Chicago-O'Hare International Airport, has worked a considerable amount of overtime which, according to his calculations, would amount to approximately \$800 or \$900. Mr. Callahan states that he is entitled to overtime compensation under the provisions of Section 25-7 of the Municipal Code of Chicago.

You have transmitted a copy of a pamphlet covering "Procedures and Forms for Standardized Timekeeping and Payroll Operations" issued by the Office of the Comptroller of the City of Chicago and have called special attention to the provisions relating to "Compensatory Time Earned" appearing on page 3 of said pamphlet.

You request our opinion as to whether Maurice Callahan is entitled to overtime compensation.

The Annual Appropriation Ordinance for 1964, p. 543 (C. J. 12-4-63, p. 1885) provides for one Chief Operating Engineer at the Chicago-O'Hare International Airport, Code 7747, at an annual salary of \$12,834.00. The Ordinance also appropriates the sum of \$65,400 for overtime (Annual Appropriation Ordinance for 1964, p. 540, Code .020; C. J. 12-4-63, p. 1882). Section 6 of the Ordinance (p. 1; C. J. 12-4-63, p. 1343) provides in part as follows:

"The salary or wage fixed shall be regarded as the maximum salary or wage rate for the respective offices or positions; * * *. The salary or wage rates fixed are on a yearly basis unless otherwise indicated."

There is no provision in the Annual Appropriation Ordinance for 1964 for compensation to the Chief Operating Engineer at the Chicago-O'Hare International Airport for overtime services performed.

It is fundamental that where no provision is made in the Annual Appropriation Ordinance for overtime compensation, no overtime compensation

can be paid. This is clearly indicated in Section 3-13-2 of the Municipal Code 1961 (Ill. Rev. Stat. 1963, Ch. 24, par. 3-13-2), where it is provided:

"The corporate authorities of any city may fix the salary of all city officers, except those who are elected for a definite term, and of all employees, in the annual appropriation ordinance. They may fix the salary of all officers who are elected for a definite term in an ordinance other than the appropriation ordinance. The salaries which are fixed in the annual appropriation ordinance shall neither be increased nor diminished during the fiscal year for which the appropriation is made. The salaries which are fixed by ordinance for those officers who are elected for a definite term shall neither be increased nor diminished during that term. No compensation shall be paid to any city officer or employee in addition to that provided in the ordinance fixing his salary."

Under this section no compensation can be paid to an employee other than that provided for in the Appropriation Ordinance fixing his salary.

The situation in the case at bar is closely analogous to that in *May v. City of Chicago*, (1906), 222 Ill. 595, where the plaintiff was employed as a clerk in the City Collector's office at a stipulated salary. The plaintiff there, at the request of the City Collector and upon his promise that the plaintiff would receive compensation for overtime work, performed certain overtime work. The appropriation ordinance in question read:

"Extra clerks for special assessment work in City Collector's office at \$3.00 per day. #7800."

The court held that since the plaintiff was regularly employed in the City Collector's office he was not "*Extra Help*" as provided for in the appropriation ordinance, saying (p. 599):

"No appropriation having been made for this extra work of the plaintiff, it is impossible by any act of the city officials to create a liability against the city for the work."

In the instant case, as in the *May* case, Callahan was employed at a fixed salary. In the instant case, as in the *May* case, there was no specific appropriations or provisions in the appropriation ordinance for overtime compensation for the position of Chief Operating Engineer. In the instant case, Section 3-13-2 of the Municipal Code 1961 (Ill. Rev. Stat. 1963, Ch. 24, 3-13-2) provides:

"No compensation shall be paid to any city officer or employee in addition to that provided in the ordinance fixing his salary."

Therefore, in the instant case, as in the *May* case, Callahan has no legal right to overtime compensation because there was no appropriation for overtime compensation, as is required by law.

The *May* case was cited with approval in *Gathemann v. City of Chicago* (1914), 263 Ill. 292. There, plaintiff was a foreman over certain men doing repair work on machinery on bridges, and all work was considered emergency work. The plaintiff was salaried and promised pay for his overtime work by the chairman of the City Finance Committee. The court, in denying the plaintiff's claim, stated (p. 295):

"The rule is settled that a person accepting a public office with a fixed salary must perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of those duties even though the salary be inadequate. Nor does it alter the case that by subsequent statute or ordinance his duties, within

the scope of the charter powers, pertaining to the office are increased and not his salary. Whenever he considers the compensation inadequate he is at liberty to resign. 'The rule is of importance to the public. To allow changes and additions in the duties properly belonging or which may be properly attached to an office to lay the foundation for extra compensation would introduce intolerable mischief. The rule, too, should be rigidly enforced. * * *'

In further discussing plaintiff's claim for additional compensation, the court said (p. 298) :

"The contention of appellant that he is entitled to extra compensation because of the promise of the chairman of the finance committee cannot be sustained. Promises to pay a municipal officer an extra fee or sum beyond that fixed by law are not binding upon the municipality, even though he rendered the services and exercised a greater degree of diligence than could legally have been required of him. I Dillon on Mun. Corp. (5th ed.) sec. 427; City of Decatur v. Vermillion, supra; May v. City of Chicago, supra." (Italics ours.)

The court further held that overtime cannot be paid unless an appropriation is made therefor in an appropriation ordinance, saying (p. 298) :

"A further reason exists why appellant cannot recover in this case. The record shows that no appropriation for the appellant's overtime work as foreman was made. It was impossible, therefore, for city officials to create a liability against the city for that work. May v. City of Chicago, supra, and cases cited." (Italics ours.)

Likewise, in the case under discussion, there is no appropriation for Callahan's overtime work as Chief Operating Engineer. It is impossible, therefore, to create a liability against the City for that work. This is in accord with the provision of Section 6 of the Appropriation Ordinance to the effect that "The salary * * * fixed shall be regarded as the maximum salary * * * for the" position of Chief Operating Engineer. This is also in accord with the provision of Section 3-13-2 of the Municipal Code 1961 to the effect that "No compensation shall be paid to any city * * * employee in addition to that provided in the ordinance fixing his salary."

In *Koons v. Richardson* (1923), 227 Ill. App. 477, the court denied recovery to a city engineer who sued the city for his salary which was fixed on a percentage basis, because there was no appropriation for his salary. In considering the same statute that was quoted in the *May* case, the court said (p. 481) :

"Where the statute requires that the salary of city officers shall be fixed by ordinance, it must be fixed in that manner and not otherwise, as we held in Lee v. City of Venice, 206 Ill. App. 376."
The court further said (p. 482) :

"When compensation is claimed for the performance of official duties, the officer must be able to support his claim by pointing to some provision of law authorizing him to demand it. Unless compensation is allowed by law, he may not lawfully demand payment as upon a quantum meruit for services rendered."

and (p. 482) :

"It is very evident from the provision of the statute, that the city council is required to fix fees, salaries or compensation of city officers at a definite sum."

In *Osborne v. City of Alton* (1955), 4 Ill. 2d 605, the court denied recovery to the city treasurer, who was also *ex officio* township collector, for commissions received as township collector, where the city council had united

the offices of city treasurer and township collector and fixed the salary of the city treasurer, saying (p. 607) :

"Section 9-99 of the Revised Cities and Villages Act [Now Section 3-13-2 of the Municipal Code 1961] provides that the corporate authorities of any city may fix the salary of all city officers, and that, 'No compensation shall be paid to any city officer or employee in addition to that provided in the ordinance fixing his salary.' (Ill. Rev. Stat. 1953, chap. 24, par. 9-99.) As stated, an ordinance of the city of Alton makes the city treasurer *ex officio* township collector, and provides that his only compensation shall be the salary as fixed by the city council."

There remains the question of who would be entitled to receive overtime compensation provided for the Chicago-O'Hare International Airport in the 1964 Appropriation Ordinance (Annual Appropriation Ordinance for 1964, p. 540, Code .020; C. J. 12-4-63, p. 1882) if the same cannot be paid to an employee occupying a position with a fixed annual salary. In light of the applicable statute, ordinance and case law, it necessarily follows that overtime can be paid only to those individuals employed at an hourly basis (Annual Appropriation Ordinance for 1964, p. 543; C. J. 12-4-63 p. 1885). Any other interpretation would ignore the provisions of Section 6 of the 1964 Appropriation Ordinance and Section 3-13-2 of the Municipal Code 1961 to the effect that no compensation shall be paid to any city employee in addition to that provided in an appropriation ordinance fixing his salary.

Section 25-7 of the Municipal Code of Chicago has no application to the facts under consideration. It provides for the amount of compensation to be paid where there is an appropriation for overtime for the particular position. Here, there is no appropriation for overtime for the position of Chief Operating Engineer at the Chicago-O'Hare International Airport.

Further, the provisions of the "Procedures and Forms for Standardized Timekeeping and Payroll Operations" pertaining to "Compensatory Time Earned" should not be applied to the case under discussion. It is the province of the City Council, as evidenced by the Annual Appropriation Ordinance, to determine "the general policy of the City to pay for time required of employees beyond the normal working hours or to allow equal time off in return."

In light of the foregoing, we are of the opinion that Maurice Callahan is not entitled to additional compensation for any overtime work he may have performed in his position as Chief Operating Engineer at the Chicago-O'Hare International Airport.

RETROACTIVE RAISES FOR RETIRED EMPLOYEES PROHIBITED

(Director, The Port of Chicago—A. H.—December 5, 1966)

Your recent letter addressed to the Honorable Raymond F. Simon, Corporation Counsel, has been referred to the undersigned for response. You ask for a legal opinion as to whether or not you may legally pay back salary to bridgetenders who had left the employ of your Department prior to the passage of an ordinance on August 25, 1966, designating that an incremental change in salary, effective January 1, 1966, be granted.

We first note the following pertinent language of the ordinance adopted August 25, 1966, to which you refer (J. Coun. Proceed., August 25, 1966, p. 7153) :

Section 1. That the following wage rates of monthly basis employees, *when doing work in accordance with the titles herein specified*, are approved :

- (1) Bridgetender, 129 at \$584.00 per month, effective January 1, 1966.

- (2) Bridgetender, 22 at \$560.50 per month, effective January 1, 1966.
- (3) Bridgetender, 16 at \$537.50 per month, effective January 1, 1966.
- (4) Roving Bridgetender and Bridgetender Operating One-Man Bridge, 104 at \$611.00 per month, effective January 1, 1966.
- (5) Bridgetender—Sick Relief, 9 at \$611.00 per month, effective January 1, 1966."

(Emphasis supplied.)

The authority to increase the foregoing salary rates appears in Section 6 of the Annual Appropriation Ordinance of the City of Chicago for the year 1966 (J. Coun. Proceed., December 7, 1965, p. 5535), the pertinent language of which is as follows:

"The salary or wage rate fixed shall be regarded as the maximum salary or wage rate for the respective offices or positions; provided that wage rates fixed on a daily, weekly or monthly basis are subject to change by the city council during the fiscal year in accordance with the prevailing wage rates in private employment for such employees."

The Department of the Port of Chicago budget includes funds for payment of salaries to bridgetenders who are designated by ordinance symbol as monthly employees and whose wage rates are therefore subject to change under Section 6 as above-cited.

From the foregoing language, the legislative intent clearly appears to be that any wage increment granted by the City Council is to be received only by "... monthly basis employees, *when doing work* in accordance with the titles herein specified, ..." The right to compensation and other emoluments of a position of bridgetender for those employees who have retired, or left the service of the City, or died, must be considered as having been crystallized and fixed upon the date on which their employment terminated. Therefore, it is our opinion that you may not legally pay back salary increments to personnel who were not employed by the City of Chicago on August 25, 1966, and could not have been "doing work" as prescribed by ordinance.

ANNUITANT'S PERFORMING PART TIME SERVICE

(Physician, Municipal T. B. Sanitarium—G. F. M.—February 2, 1961)

In response to your question concerning pensions of certain retired nurses, the following is submitted.

Your letter states that your budget makes provisions for nurses who may be hired at an hourly rate; that one or two of your retired nurses who are not on pension would like to do part time work, two days per week on the hourly rate; that they are concerned as to whether or not their pension will be suspended if they do this, and that because of your shortage of nurses you would appreciate a reply as to whether or not they may work two days per week without suspension of pension.

Section 34 of the Act governing the Municipal Employees', Officers', and Officials' Annuity and Benefit Fund (Ill. Rev. Reports, 1959, Ch. 24, Section 1077) provides in part thereof as follows:

"(a) Whenever any Municipal Employee who shall resign or be discharged after the first day in the month of January of the first

year after the year in which this Act shall come into force and effect in such city, shall re-enter before he shall have attained an age of sixty-five (65) years any annuity previously granted to such Municipal Employee * * * shall be cancelled * * *

"(b) When any Municipal Employee shall re-enter the service after he shall have attained an age of sixty-five (65) years or more, payment of equal of any annuity previously granted to such Municipal Employee shall be suspended during the time thereafter that he shall be in the service * * *

In accordance with the provisions of the above section of the Act governing the Municipal Employees', Officers', and Officials' Annuity and Benefit Fund, we are therefore of the opinion in the event that if any of your former nurses who have retired should return to work, any annuity or pension payable to them from that fund would be suspended. However, if any of the nurses who plan to return to service in your office are receiving a pension from any Fund other than the Municipal Employees', Officers', and Officials' Annuity and Benefit Fund their annuity will not be suspended.

PAYMENT TO HOSPITAL CARING FOR INCOMPETENT

(Retirement Board of the Municipal Employees', Officials' and Officers' Annuity and Benefit Fund of Chicago—G. F. M.—June 8, 1961)

In response to your request for an opinion as to whether or not annuity and disability benefits payable by your Fund to a person declared incompetent may be paid to the Superintendent of the institution where they are confined, the following is submitted.

Section 60 of the Act governing your Fund (Ill. Rev. Stats. 1959, Chap. 24, Sec. 1103) provides in part thereof as follows:

"In all cases in which the annuity or disability benefit is payable to a minor or to a person adjudged insane or mentally incompetent, the Retirement Board, may, in its discretion and when to the best interest of such minor, or insane or mentally incompetent person, pay such annuity or benefit to the person providing or caring for such minor, and to the wife, parent, or blood relative providing for or caring for such insane or mentally incompetent person."

It is recognized that, in many instances, an insane or incompetent person may not have a wife, parent or blood relative caring for them and therefore the above quoted section of your Act is not helpful to them.

The Legislature in its wisdom also realizes that there might be many cases in which an insane or incompetent person would not have a wife, parent or blood relative able to care for such incompetent person. Therefore, among the general powers and duties of the Department of Public Welfare in the Act governing such Department, provided, in Section 3 thereof (Ill. Rev. Stats. 1959, Chap. 23, Sec. 3), as follows:

"All types of retirement and pension benefits from private and public sources may be paid directly to the superintendent of the hospital where the patient is residing, for deposit to the patient's trust fund account * * *

Each superintendent shall keep in a book an itemized account of all receipts and expenditures of the fund described in the above proviso which book shall be open at all times to the inspection of the Department of Public Welfare."

The annuity and disability benefits payable by your Fund are for the use and benefit of the person entitled to receive them. If such person is incompetent and therefore not able to receive them and there is no person helping or assisting him falling within the limitations fixed by the Act governing your Fund, it follows that their benefits should be paid to the person appointed by the State of Illinois to take care of such individual, so that the individual so confined will not be denied any of the benefits which he might not otherwise receive.

We are, therefore, of the opinion that your Board would have the right to make payments of disability benefits or annuities to a Superintendent of the institution where an incompetent is confined, to be used solely for the benefit of the individual concerned.

SALARIES AS BASIS FOR PENSION

(Retirement Board—G. F. M.—May 3, 1963)

In response to your request for an opinion concerning Mr. Charles B. McBrearty, the following is submitted.

Your records show that Charles B. McBrearty holds a Civil Service position of WD-Laborer (Jackhammerman) in the Bureau of Engineering Department of Public Works; that as such laborer (Jackhammerman) his salary is fixed (as appears on Page 393 of the Appropriation Ordinance of the City of Chicago) at \$3.57½¢ per hour; that payroll 3860 indicates that he is being paid semi-monthly for 15 days at the rate of \$3.57½¢ per hour, or \$28.60 a day; that your records contain a letter from a Mr. Ernst Stromback, the Engineer of Water Works Construction, dated January 10, 1961, which contains in part thereof the following:

"Mr. Charles McBrearty, a Civil Service WD-Laborer, has been employed in the Department of Public Works, Construction Division, for the past 23 years, pro-rated to various Annual Salaries and Titles, commensurate with his abilities and duties, and for the past 5 years performing the duties of Administrative Assistant III on an annual salary basis as arranged by the writer in 1956."

His salary has been pro-rated in our payroll 3280 as a WD-Laborer (Jackhammerman) as shown on the attached statement to meet the salary arranged.

"It is our opinion Mr. McBrearty is entitled to pension on his full earnings since working on an arranged salary basis all these years, is subject to duties on all Saturdays also Sundays, and all holidays as required."

There also appears a letter from Charles McBrearty dated April 3, 1963, which contains, among other things, the following information:

"On arranged salary basis since 1958, performing duties of Administrative Assistant III, put into effect by Mr. Ernst Stromback, Engineer of Water Works Construction . . ."

Your file discloses further that in the year 1958 Charles McBrearty was paid on a basis of 13½ days semi-monthly; in 1959, on 14¼ days semi-monthly; in 1950, on 14½ days semi-monthly, and for 1961, 1962, and thus far in 1963, has been paid for 15 days semi-monthly.

Section 12 of your Act governing your fund (Ill. Rev. Stat. 1961, Chap. 24, Section 1119) contains in part thereof, as follows:

"[Salary] Annual Salary. In cases where the salary is appropriated or fixed or arranged on an annual basis, the actual sum which would be payable to an employee during the year if he worked the full regular normal working time in the position in the service held by him, at the rate of compensation, exclusive of overtime, appropriated or fixed as salary or wages for service in such position held by him, shall be considered the annual salary and the maximum annual salary of such contributor for each year. Where the salary or wage is appropriated, fixed or arranged on other than an annual basis, the applicable schedules outlined in Section 40 of this Act shall be observed to convert the salary to an annual and maximum annual salary basis, and the sum obtained when so converted to an annual basis shall be the specified and defined annual and maximum annual salary under this definition. . . ."

The amount of salary paid to Mr. McBrearty for one years service is \$10,296.00. It is based on 15 days semi-monthly at a rate of \$28.60 per day, or \$3.37½¢ per hour. The Appropriation Ordinance of the City of Chicago provides that the persons occupying the position of Administrative Assistants III shall receive an annual salary.

It appears from a portion of the letter signed by Ernst Stromback that Mr. McBrearty is not performing overtime services for the moneys he receives.

The Municipal Code of the City of Chicago (Chap. 25, Section 9) provides in part thereof as follows:

"Eight hours of labor shall be and constitute a day's work for all employees performing manual labor for the city. The provisions of this section shall not be construed to apply to or govern the police or fire departments, or any department or workshop where constant operation is necessary. Provided, however, that in all cases of necessity or emergency, superintendents, foremen or others in authority are hereby authorized to work their employees such number of hours as such necessity or emergency may require, but for all labor performed in excess of eight hours in any one day such laborer or employee shall be entitled to and shall receive pay at the rate of time and one-half for all such labor performed, except in those employments where there is an established scale of wages and hours which is usually and customarily paid for such excess time by employers generally within the city for like services, in which event such labor in excess of eight hours in one day shall be paid for according to the wage scale, hours and conditions so established."

It appears from the information in your file that when necessary, Mr. McBrearty perform work on such Saturdays, Sundays or holidays as required without receiving any additional compensation for such additional services. It follows that while Mr. McBrearty is being paid on an arranged annual basis under the express authority of the Engineer of Water Works Construction of an amount in excess of that which would be attached to his Civil Service position, he is not being paid moneys in the form of overtime. It is apparent from the manner in which Mr. McBrearty is being paid that the salary paid to him is for his services as an Administrative Assistant III. It is an annual salary paid in monthly installments.

We are, therefore, of the opinion that Charles McBrearty should have deductions made from the entire salary received by him throughout the year and any annuity which may become payable to Mr. McBrearty upon his retirement should be computed on the basis of an annual salary.

LAND CLEARANCE COMMISSION EMPLOYEE

(Retirement Board of the Municipal Employees', Officers' and Officials' Annuity and Benefit Fund—G. F. M.—May 22, 1962)

In response to your request for an opinion as to whether or not service rendered to the Land Clearance Commission by employees of the "Land Clearance Commission" can be considered as service rendered by a municipal employee, the following is submitted.

Under an Act of the Legislature passed in the year 1961 the City of Chicago is now able to consolidate the Land Clearance Commission with the Community Conservation Board into the Department of Urban Renewal. It is expected that this consolidation will be affected in the near future. At the time of the consolidation, the Land Clearance Commission employees will become employees of the City of Chicago and will be paid by the City of Chicago as such employees.

Section 12 of the Act governing your Fund (Ill. Rev. Stats. 1961, Chap. 24, Section 1053) provides in part thereof as follows:

"This definition shall include and this Act shall apply to said person and any other person who was, is, or shall be employed by such city or Board of Education as an employee, provided said person or other persons, shall, before being included as a Municipal Employee meet the following qualifications:

(1) have rendered service during not less than 12 calendar months to such city or Board of Education of such city as an employee, officer, or officials, four of which such calendar months of service must have been consecutive, full, normal working months of service rendered immediately prior to filing application to be included, and

(2) filing written application, while in the service, with the Retirement Board created by this Act to be included under the provisions of this Act."

The employees of the Land Clearance Commission are not now employees of the City of Chicago, and cannot receive credit for their service as such employees in your Fund.

After the employees of the Land Clearance Commission have become employees by reason of the Urban Consolidation Act of 1961 and have complied with the above quoted provisions of the Act governing your Fund, they will be entitled to become participants in your Fund.

We are, therefore, of the opinion that upon fulfilling the conditions described above, such employees will be entitled to become employees of your Fund.

EFFECTS OF RE-ENTERING THE SERVICE

(Commissioner of Streets and Sanitation—G. F. M.—May 16, 1963)

In response to your request for an opinion concerning the hiring of Leslie J. Sorenson as a Traffic Consultant, the following is submitted.

Your letter states that Leslie J. Sorenson is a former employee of the City of Chicago who resigned from his position as City Traffic Engineer about two years ago; that Mr. Sorenson now receives an annuity from the Municipal

Employees Annuity and Benefit Fund of Chicago; that as an annuitant he is required each month to file a statement to the effect that he is not an employee of the City of Chicago; and that you wish an opinion as to whether or not Mr. Sorenson could be retained as such consultant and still receive his annuity.

A supplemental letter enlarges on the hiring of Mr. Sorenson and states that he will be hired on a per diem basis; that from the letter it appears that Mr. Sorenson will not be working daily as a consultant but only at such times as are deemed necessary by your department.

The Act governing the Municipal Employees Annuity Benefit Fund provides, in part thereof (Ill. Rev. Stat., 1961, Chap. 24, Section 1077) as follows:

"(b) When any such municipal employee shall re-enter the service after he shall have attained the age of sixty-five (65) or more years, payments on account of any annuity previously granted to such municipal employee shall be suspended during the time thereafter he shall be in the service . . ."

Mr. Sorenson is being hired not as an employee but as an independent contractor. He is not working for the City on a continuing basis but only at such times as are deemed necessary by the Department of Streets and Sanitation. Further, he is being paid on a per diem rate for such work as he may perform in his capacity as an independent contractor.

Inasmuch as the manner of retention of Mr. Sorenson is other than that as an employee, we are of the opinion that Mr. Sorenson has not "re-entered the service" as is provided in the above quoted section of the Act governing the Municipal Employees Annuity and Benefit Fund, and therefore does not come under the provisions of the section of the Act governing the Municipal Employees Annuity and Benefit Fund above quoted.

COMPUTATION OF SALARY

(Retirement Board of the Municipal Employees,' Officers' and Officials' Annuity and Benefit Fund—G. F. M.—July 10, 1963)

In response to your request for an opinion concerning the proper method of computing the annual salary of one James B. Solomon, the following is submitted.

Your letter states and your records show that James B. Solomon was employed by the City of Chicago as a stationary fireman in the Bureau of Water; that he retired from the service July 1, 1962; that Mr. Solomon feels incorrect figures have been used in computing the amount of his annual salary; that he claims his annuity should be based on the salary paid for 274 days; that Mr. Solomon appeared before your Board accompanied by his attorney and testified that he was a stationary fireman in the City of Chicago and that his normal and regular working period of time was 42 hours a week; that it was stipulated that for the hours he worked over 40 hours a week his pay was computed on the basis of time and a half for two hours and double time for holidays; that James L. Weeks, Engineer in charge of water pumping for the City of Chicago testified that Mr. Solomon, whom he had known for a good many years, normally worked 40 hours a week; that in addition he also put in two hours of overtime each week; that for such overtime Mr. Solomon was paid on the basis of time and a half, and that on national holidays he was paid double time; that the sole point at issue is whether Mr. Solomon regularly and normally worked (for annuity purposes) 20 days out of each four week period ($13 \times 20 = 260$) or 21 days ($13 \times 21 = 273$) during the year.

Because there are 365 days in a year and there are 13 four week periods ($13 \times 28 = 364$) it is necessary to add one day to the period of time that Mr. Solomon works, which would give him a total of either 261 days or 274 days to be used in the computation of annual salary in determining his annuity.

Section 12 of the Act governing your Fund (Ill. Rev. Stat. 1961, Chap. 24, Section 1055) provides in part thereof as follows:

"'Salary': Annual Salary: provided, that in cases where the salary is appropriated or fixed on an annual basis, the actual sum which would be payable to an employee during the year if he worked a full, regular, normal working time in the position of the service held by him, at the rate of compensation, *exclusive of overtime*, appropriated or fixed as salary or wages for services in such position held by him, shall be considered the annual salary and the maximum annual salary of such municipal employee for such year. Where the salary or wage is appropriated, fixed, or arranged on other than an annual basis, the applicable schedules outlined in Section 40 of this Act (Ill. Rev. Stats. 1961, Chap. 24, Section 1083), shall be observed to convert the salary to an annual and maximum annual basis, and the sum obtained when so converted to The budget for the City of Chicago for the year 1962, Council Proceed-an annual basis shall be the specified and defined annual and maximum annual salary under this definition, . . ."

ings, December 7, 1961, p. 6310, shows that the rate or pay for the stationary fireman for regular and normal working hours was \$3.48 per hour.

Section 40 of the Act governing your Fund (Ill. Rev. Stats. 1961, Chap. 24, Section 1083) provides in part thereof as follows:

"Daily Basis: —Annual Salary shall be considered to be an amount such number of times the daily wage as the number of days which the position held by the municipal employee is appropriated for, or as the employee in such position, *exclusive of overtime, or extra service*, normally and regularly works, but not less than two hundred sixty (260) days, nor more than three hundred (300), times such daily wages in any event. . . ."

"Hourly Basis: —Annual Salary shall be considered to be an amount of such number of times the hourly wages, as the number of hours which the position held by the municipal employee is appropriated for, or as the employee in such position, *exclusive of overtime, or extra service*, normally and regularly works, but not less than twenty hundred eighty (2080) nor more than twenty four hundred times (2400) such hourly wages in any event. . . ." (Italics added.)

It is to be noted in the definition of "Salary", salary is defined as the actual sum which would be payable to an employee if he worked a full, regular, normal working time in the position of the service held by him *exclusive of overtime*; that in the definition of "Hourly Basis" contained in Section 40 of the Act, annual salary is to be considered to be the amount of such number of times the hourly wages as the number of hours in the position held by the municipal employee . . . *exclusive of overtime or extra service, normally and regularly worked.* . . .

The City of Chicago does not enter into a contract with the Union for stationary firemen but its practice is to pay the prevailing wage for the prevailing number of hours normally worked which is embodied in contracts entered into between the Firemen and Oilers Union and private industry.

For that reason the eight hours or one day additional that is worked every four weeks by stationary firemen is paid for at time and one-half, or by means of overtime. These thirteen days of the year, one every four weeks, are therefore, overtime.

From the figures submitted by Mr. Solomon, it is clear that he considered the 8 hours additional which he has worked every four weeks to be a regular working day and as a result has arrived at the erroneous figure of 274 days as the period of time that he has worked during the year for the City of Chicago in his position as stationary fireman. While undoubtedly Mr. Solomon has worked these days, under the provisions of the Act governing your Fund, any time which is considered overtime is not to be used in the computation of salary received for annuity purposes.

These thirteen days which are made up entirely of overtime should be subtracted from the total number of days worked by Mr. Solomon, leaving him a total number of normal and regular working days exclusive of overtime throughout the year of two hundred sixty one. Mr. Solomon's contention that because he was paid at the rate of two hundred seventy four days a year, fails to take into consideration it is overtime for which he was paid the one extra day every four weeks, or the total of thirteen extra days per year when he receives one and one-half times his regular rate.

The question resolves itself into an interpretation of the Act governing your Fund. The words "exclusive of overtime" can only mean what they say—any period of time for which an additional amount over and above the regular basis as paid must be considered overtime or extra service and not the normal and regular working time. If this time was regular and normal working time it would not command an additional amount of money.

In construing statutes, as a general rule, the statute must be construed as a whole or in its entirety, and the legislative intent gathered from the entire statute rather than from any part thereof:

People ex rel. Nelson Olympic Building Corporation, 1951, 91 N. E. 2d 597, 405 Ill. 440.

It follows that all the words of the statutes including the words "exclusive of overtime" must be considered, and not merely the words "normally and regularly worked."

Your Retirement Board has for a great many years considered the words "exclusive of overtime", "exclusive of overtime or extra service" to mean any period of time for which compensation in excess of that paid on a regular basis is paid to an individual. Therefore, it follows that the statute as construed by your Retirement Board has been that the regular normal working time of a member of your Fund is that period for which he receives compensation on a regular basis.

While a contemporaneous construction of a statute made by the Board, the officers, or departments of the fund charged with the duty of executing it, is not resorted to by courts where the statute is clear and unambiguous, in determining the proper construction of a statute on which two different interpretations have been put, the contemporaneous construction placed on it by such officers or departments is to be so considered and given weight and will usually be adopted by the court.

Chicago Title and Trust Company v. Central Republic Truck Company, 20 N. E. 2d 351, 299 Ill. A. 483.

McNely v. Board of Education of Community Unit School Dist. No. 7, 137 N. E. 2d 63, 9 Ill. 2d 143.

That your interpretation that it was the intent of the Legislature that the words "Exclusive of overtime", or "exclusive of overtime or extra service" was to mean any period of time for which compensation in excess of that paid on a regular basis is paid to an individual is substantiated by a recent amendment to Section 8-233 of the Act governing your Fund, which was adopted by the 1963 session of the Legislature which provided in part thereof as follows:

(b) Daily basis: —Hourly basis: —260 times such daily wage; 2080 times such hourly wage; hereby established as the norm.

The norm as hereby established is based on a 12-month per year, 5-day work week of 8 hours per day and 40 hours per week, with consideration given only to time compensated for at straight time rate of compensation or wage. The norm shall be increased (subject to a maximum of 300 days or 2400 hours per year) or decreased, as respects an employee, according and to the extent that the normal and established work period at straight time compensation or wage, for the position held by such employee in the class, grade, or category in which he is assigned, is for a greater or lesser number of months, days or hours than the period on which the established norm is based.

Daily wage, and hourly wage, shall mean respectively, the normal, regular or basic straight time rate of compensation or wage appropriated and payable to an employee for a normal and regular day's work, or hour's work, in his position in the service.

Any time worked in excess of the norm or the increased or decreased norm, whichever is applicable, and any compensation, salary, or wage attached to or paid for such time, which is compensated for at overtime, premium, or other than regular or basic straight time rates, shall not be considered as time worked, or as salary or wage. Such time and compensation shall be in every case and for all purposes considered overtime, and shall be excluded for all purposes and all computations under this Section and Article. However, the straight time portion of compensation or wage, for time worked on holidays which fall within the employee's herein established norm, shall be included for all purposes and computations under this Section and Article.

It is readily apparent that the Legislature has always clearly intended that any time for which additional moneys in excess of the base rate were paid, should be treated as overtime.

This clarification by the Legislature of its intent as to what shall constitute the basis of annual salary unequivocally corroborates your interpretation of the statute which was in force and effect prior to the adoption of this amendment.

We are, therefore, of the opinion that the words "Exclusive of overtime", or "exclusive of overtime or extra service" as used in the statute means any period of time for which a member of your fund is paid overtime and should not be used in computing the salary of an employee for annuity purposes.

We are also of the opinion that the period of time upon which the amount of salary received by Mr. Solomon to be used in the computation of his annuity is the total amount received by Mr. Solomon for his services based on 261 days a year.

"YEAR" DEFINED

(Retirement Board of the Municipal Employees Annuity and Benefit Fund—G. F. M.—July 23, 1964)

In response to your request for an opinion concerning the interpretation of certain sections of your Act, the following is submitted:

Your letter states that an employee withdraws from service on July 1, 1963, having service credit of 36½ years, and having attained age 65. You have requested an opinion as to whether credit of the half year could be considered to mean service year instead of calendar year for the purposes of Section 138 of your Act.

Section 138 of the Act governing your Fund (Ill. Rev. Stats. 1963, Chap. 108½, Section 8-138) provides in part thereof as follows:

"The maximum annuity payable under this Paragraph and paragraph (a) of this Section shall not exceed 60% of highest average annual salary. However, this maximum shall be increased by 1⅓% of such salary, or by \$100.00, whichever is lesser, for each year of service (not to exceed 6 years) credited for service, beginning with the year the employee attains age 60, or the year immediately following the year in which the 60% has accrued, whichever last occurs."

Section 232 of the Act governing your Fund (Ill. Rev. Stats. 1963, Chap. 108½, Section 8-232) provides in part thereof as follows:

"(a) In computing the period of service of any employee for the minimum annuity under Section 8-138, the following provisions shall govern:

(3) Service during 6 or more months in any year shall constitute a year of service, and service of less than 6 months but at least 1 month in any year shall constitute a half year of service".

It is to be noted that under the above quoted Section of the Act (8-138) that it provides an increase for annuity "for each year of service (not to exceed 6 years) credited for service, beginning with the year the employee attains age 60, or the year immediately following the year in which the 60% has accrued, whichever last occurs." The years for this employee were not calendar years running from January 1 of each year to December 31, of the same year, but were service years. It therefore follows that the year in which the maximum of 60% was reached terminated on January 30, 1964, as he had completed 36 years of service on February 1. It therefore follows that in circumstances such as are set out above, the year "immediately following the year in which the 60% has accrued" began on the day following the date on which the employee had completed 36 years of service.

To hold that the word "year" as used in Section 8-138(b) (3rd Paragraph) means the calendar year, would be manifestly unfair to those individuals who would attain one of the two requirements in the early part of the year, such as in this case, as compared with an employee who would attain either of the two requirements in the latter part of December of a year. The first employee might be required to wait over 11 months to gain such credit and the other employee would be required to wait but a few days.

We are, therefore, of the opinion that the words "the year immediately following the year the 60% has accrued" does not mean the calendar year in which such event occurs, but the period immediately following the time when the earning of an annuity of 60% has accrued.

INVESTMENTS

(Retirement Board of the Municipal Employees Annuity and Benefit Fund—G. F. M.—February 22, 1965)

In response to your request for an opinion concerning the interpretation of a portion of Article 8, Section 201 (6) of the Act governing your Fund, the following is submitted:

Your letter states that certain state banks issue capital notes from time to time, and you have requested an opinion as to whether or not your Retirement Board may purchase such notes as part of their investment portfolio, on the basis that such state banks are finance corporations.

Section 8-201 of the Act governing your Fund (Ill. Rev. Stat. 1963, Chap. 108½, Section 8-201) provides, in part thereof, as follows:

"Section 8-201. To invest the reserves of the Fund in the following securities: (6) * * *; bonds or other evidences of indebtedness of any industrial or finance corporation; provided (a) such bonds or other evidences of indebtedness shall be issued or guaranteed by corporations which are incorporated in one of the States of the United States".

A finance corporation has been defined by the Courts as follows:

"The word 'financial' when used with reference to corporations, indicates dealing in money". *Crown Finance Corporation v. McColgan*, 23 Calif. 2d 280, 144 Pac. 2d 331-333.

In the same case, the Court further said:

"A corporation is not a financial corporation unless it is in competition with the business of national banks".

and further:

"banks competing with a national bank and dealing in moneyed capital are financial corporations".

Another definition of "financial corporation" was set-out in the case of *Morris Plan Bank of San Francisco v. Johnson*, 37 Calif. App. 2d 621, 100 Pac. 2d 493, as follows:

"'Financial corporation' designates and includes moneyed corporations performing some of the functions of a national bank, the quoted term meaning a corporation dealing in money as distinguished from other commodities".

The state banks which may issue capital notes from time to time are certainly in competition with national banks established by National Charters. They are also corporations who deal in money rather than other commodities. As these banks fall within the scope of the definitions which have been set up by courts, it is our opinion that they are finance corporations and as such finance corporations, any capital notes issued by them would come within the scope of "other evidences of indebtedness of any * * * financial corporation".

We are, therefore, of the opinion that under the provisions of the law which governs your fund, you are permitted to invest in capital notes issued by state banks of any of the States of the United States.

DUTY DISABILITY FOR DISEASE FROM UNKNOWN CAUSES

(Retirement Board of the Municipal Employees', Officers' and Officials' Annuity and Benefit Fund—J. G. O.—July 5, 1965)

In response to your request for an opinion concerning one William R. McNally, the following is submitted.

William R. McNally, a former lamp maintenance man in the Department of Streets and Electricity and a member of your Fund, was injured August 31, 1959, on which date he allegedly slipped on the back of a wet truck and injured his face and head. He applied for duty disability benefits from your Fund, which duty disability benefit was denied and ordinary duty disability benefit granted, with the provision that the Retirement Board would grant a rehearing in the matter at some future date, if Mr. McNally should wish to present evidence or testimony in furtherance of his claim for duty disability benefits.

Mr. McNally made such a request for a re-hearing by letter on September 27, 1961, but died on October 2, 1961, before a hearing could be had.

Mr. McNally was referred to Dr. Raphael J. Welsh, physician for the Fund on May 9, 1960; Dr. Welsh reported that in January, 1960, McNally alleged he began noticing progressive muscular weakness. He was hospitalized for three days in March at Loretto Hospital and was then transferred to Illinois Research Hospital for four days. His condition was diagnosed by Dr. Welsh as multiple sclerosis. Dr. Welsh stated that his condition was not the result of a performance of an act of duty and recommended that ordinary disability benefits be paid to him.

William McNally continued to get progressively worse and in December of 1960, it was suggested that William McNally be examined by a specialist and as a result thereof, Dr. Harold C. Voris examined this man at his home at 1157 South Grove Avenue, on December 7, together with Dr. I. B. Earl, who was Mr. McNally's own physician. Dr. Earl had carried out extensive and thorough studies, making an encephalogram on January 30, 1960 and brain x-rays of the patient's skull on February 10.

Dr. Voris' report shows there were also pneumoencephalograms dated March 14th, 1960, and while these showed minor enlargements lateral and third ventricle, it had somewhat of a more than usual amount of subarachnoid air, there was no distortion or displacement of the ventricular system which would indicate a space occupying lesion. The patient's symptoms continued to progress and several months later he was unable to walk.

Dr. Voris ends his report upon this man with the following statement:

"The etiology of the disease is unknown. In my opinion there is no evidence that such a condition as this is produced by trauma, and it is my specific opinion that the minor injury which this patient is alleged to have suffered in August, 1959, is not the cause of his present neurological condition."

"The same may be said as far as the electroencephalographic and pneumo-encephalographic findings are concerned."

Dr. G. Pallash diagnosed the condition of William R. McNally as follows:

"Although this may be a condition of one of several different types of neurological pathology such as post traumatic cerebral damage, Huntington's chorea, paralysis agitans, residual effects of a viral encephalitis, multiple sclerosis, amyotrophic lateral sclerosis and numerous other conditions, it is my opinion, derived from my meager examination and from the history of his injury that this patient's condition is probably a post traumatic sequel to a brain injury."

"Of course, much more hospital and neurological work will have to be performed to arrive at a possible definite conclusion."

Dr. William V. Fitzsimmons stated that in his opinion Mr. McNally suffered from a traumatic injury due directly to the accident which occurred on August 31, 1959.

Dr. Manfredi, a neuro-surgeon at Loretto Hospital, made a pneumo-encephalogram and gave a tentative diagnosis of multiple sclerosis in March of 1960.

Dr. Robert L. Tentler, a neurologist, who examined Mr. McNally at Loretto Hospital, diagnosed the ailment as follows:

1. Possible multiple sclerosis, or post traumatic stenosis of the aqueduct of silvius.
2. Visceral epilepsy.

Taber's Cyclopedic Medical Dictionary, Edition 9, 1962, defines multiple sclerosis as follows:

"A chronic, slowly progressive disease of the central nervous system characterized by development of disseminated demyelinated glial patches called plaques. Symptoms and signs are numerous, but common in later stages are those of Charcot's triad (nystagnus, scanning speech, and intention tremor). Occurs in the form of many clinical syndromes, the most common being the cerebral, brainstemcerebellar, and spinal. A history of remissions and exacerbations is diagnostic. Etiology is unknown and there is no specific therapy."

In the instant case we readily see that doctors (the expert witnesses) had varying opinions as to the cause of death. We should be mindful of the fact that in the case of disagreement between the testimony of two witnesses or group of witnesses giving expert opinions, the preponderance or weight of the testimony is not determinable by any rule of law or with technical accuracy, but is a matter to be determined by the jury, or the trial judge in a non-jury case, from all the circumstances appearing in evidence, and in the light of knowledge and judgment derived from experience, observation and reflection.

In a death action, evidence is admissible as to the physical condition of the decedent prior to the accident or occurrence which caused his death (or injury). There is no evidence of McNally having had a physical disorder or any other physical deficiencies prior to the accident.

In view of the above, and bearing in mind that "the etiology of the disease is unknown," your Board may properly find under the facts and the law that Mr. McNally was entitled to "duty disability."

CHICAGO CITY COLLEGE EMPLOYEES

(Mayor—A. H.—April 15, 1966)

Your communication of April 14, 1966, requesting this Department's opinion as to the law governing the matters raised in a letter dated April 11, 1966, signed by fifteen clerks employed by the Woodrow Wilson Branch, Chicago City Junior College, has been referred to the undersigned for response. In their letter, the clerks state their understanding that as of July 1, 1966, the Junior Colleges will be taken over by the State of Illinois and that although they are to remain with the Chicago Civil Service Commission, their pension rights will be integrated with the University of Illinois pension system. They ask whether it is possible for them to remain under Chicago jurisdiction and continue paying into their own pension fund.

The "Public Junior College Act" (Ill. Rev. Stat. 1965, Ch. 122, Pars. 101-1, *et seq.*) was enacted in 1965 and took effect in June of that year. This Act creates and classifies various Junior Colleges in the State of Illinois and provides for the creation of local Districts and Boards which are to operate under the Act.

An application was made on December 21, 1965, by the Chicago Board of Education to the Illinois Junior College Board and the Illinois Board of Higher Education for acceptance of the City of Chicago as a Class I Junior College District, in conformance with Sections 2-13 and 2-14 of the Public Junior College Act (Ill. Rev. Stat. 1965, Ch. 122, Pars. 102-13, 102-14), which was approved by said Boards. Pursuant to said approval, the Chicago Board of Education, by resolution, resolved, among other things, that the Mayor of the City of Chicago be requested to appoint members of the Class I Junior College Board of Junior College District No. 508, which is coterminous with

the boundaries of the City of Chicago, and resolved further to attempt to arrange a transfer of assets, facilities and other matters to said District No. 508 effective July 1, 1966, if possible. A copy of said resolution, dated April 13, 1966, is hereto attached.

Up to the present time, employees of the Junior Colleges under Chicago Board of Education jurisdiction have been contributing to the Municipal Employees', Officers' and Officials' Annuity and Benefit Fund of the City of Chicago; however, amendments to Sections 15-106 and 15-107 of the Illinois Pension Code adopted in 1965, provide for participation by the Class I Junior College Board employees in the State Universities Retirement System (Ill. Rev. Stat. 1965, Ch. 108½, Pars. 15-106, 15-107). Section 15-134 of the Code makes participation in the Retirement System by members of the educational, administrative, secretarial, clerical and other staff members a condition of employment.

Under Section 15-192 of the Pension Code (Ill. Rev. Stat. 1965, Ch. 108½, Par. 15-192), the Retirement Systems Reciprocal Act (Ill. Rev. Stat. 1965, Ch. 108½, Pars. 20-101 through 20-133), which is a plan established to promote the continuity and preservation of pension credit in the case of employees transferring employment from one governmental unit to another, thereby assuring full and continuous pension credit for all service in public employment covered by a retirement system, was adopted and is operative in the State Universities Retirement System. The Retirement Systems Reciprocal Act was also adopted and is operative in the Municipal Employees', Officers' and Officials' Annuity and Benefit Fund Act of the City of Chicago (Ill. Rev. Stat. 1965, Ch. 108½, Par. 8-236).

From the foregoing provisions, it must be concluded that employees of the new Junior College District No. 508 (City of Chicago) must participate in the State Universities Retirement System with respect to their pension rights. Because said employees will have contributed to two different pension funds, under the Retirement Systems Reciprocal Act their benefits will be appropriately apportioned with full pension credit for all service rendered in public employment.

CHAPTER III—ANNUITIES AND BENEFITS FOR CITY EMPLOYEES

Section B. FIREMEN'S ANNUITY AND BENEFIT FUND

SERVICE CREDITS TO PENSIONER

(Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago—G. F. M.—May 23, 1961)

In response to your request for an opinion concerning Ralph E. Fornowski, the following is submitted.

Your letter states and your records show that Ralph E. Fornowski was born July 21, 1898; that he entered the service of the Chicago Fire Department on January 30, 1928; that he expects to serve continuously until his attainment of age 63, which will be on July 21, 1961; that it is the practice of the Fire Department that members who are being retired under the compulsory retirement law, receive their salary for their birthday, just as though they were working until 8:00 A. M. the following day, whether or not it is their regular work period; and that you request a Corporation Counsel opinion as to whether or not Mr. Fornowski would be entitled to be credited with an additional two per cent (2%) of salary for pension purposes on July 21, 1961.

Section 56 of the Act governing your Fund (Ill. Rev. Stats. 1959, Chap. 24, Section 944.56) provides in part thereof as follows:

"Notwithstanding the provisions of any foregoing section or sections of this Act, any present employee who shall resign or be discharged from the service on or after the date upon which this Act shall come in force and effect in such city, and after he shall have completed twenty or more years of service, and for whom the amount of annuity provided in accordance with the foregoing provisions of this Act shall be less than the amount stated hereinafter in this section, shall have a right to annuity as follows:

"Any such present employee who shall be fifty (50) or more years of age at the time of his resignation or discharge from the service, shall have a right to receive annuity, from and after the date of such resignation or discharge, of an amount equal to fifty (50%) per cent of the salary of such present employee as such salary shall be on the day one year prior to the date of this resignation or discharge from the service * * *

"Any such present employee who remains in the service after qualifying for annuity as hereinbefore provided in this section or by virtue of Section 52 of this Act, shall have added to said annuity an amount equal to an additional one (1%) per cent of salary for each completed year or fraction thereof served until the effective date of this Amendatory Act in 1959, and an additional one (1%) per cent for a total of two (2%) per cent of salary from and after the effective date of this Amendatory Act in 1959; provided that the salary referred to in this paragraph shall be determined by striking an average of the five (5) consecutive highest years of salary within the last ten (10) years of service, immediately preceding his resignation or discharge from the service."

Mr. Fornowski is a present employee, he having entered the Fire Service in the year 1928, and therefore comes under the provisions of this Section. The last paragraph quoted above was added to this Section by an Amendment which was signed by the Governor of the State of Illinois on July 21, 1959, which is the same day on which Ralph Fornowski was born and the same day on which he will attain 63 years of age.

Inasmuch as it has been the practice of the Fire Department of the City of Chicago to pay members who are being retired under the compulsory retirement law their salary for their birthday, just as though they were working on that date from 8:00 A. M. on their birthday until 8:00 A. M. the following day and as Mr. Fornowski will be a member of the Fire Department on the 21st day of July, he according to the practice of the Fire Department of the City of Chicago, will be retained on the rolls until 8:00 A. M. on July 22nd.

We are, therefore, of the opinion that Mr. Fornowski, upon his retirement from the Fire Service, if he does not retire until such time as he attains age 63 years, will be entitled to have an additional two (2%) per cent of his average salary for the highest five consecutive years of service within the last ten years of service for the period of July 21, 1960 to July 21, 1961, added to his annuity.

PRO-RATING CONTRIBUTIONS

*(Retirement Board of the Firemen's Annuity and Benefit Fund—
G. F. M.—January 4, 1962)*

In response to your request for interpretation of the Death Benefit Provisions added by the General Assembly of the State of Illinois in the session held in 1961, the following is submitted.

Your letter submits questions as to various phases of the death benefit fund. These questions will be answered in the order in which they are asked.

In response to your question as to whether or not the contributions are required to be paid by firemen should ever be pro-rated, paragraph 5 (d) of Section 55½ of the Act governing your Fund (Ill. Rev. Stats. 1961, Chap. 24, Section 955½) provides in part thereof as follows:

"To provide the cost of the ordinary death benefits such firemen in service after January 1, 1962, shall make an additional contribution over and above the contributions provided in this Act, in the amount of \$2.50 per monthly period."

This can only mean that for a portion of a month a man pays but a portion of the \$2.50.

In response to your question number 2. Paragraph 3 of Section 55½ provides that death benefits shall be paid upon the death of a fireman receiving duty disability benefits or ordinary disability benefits.

In response to question number 3. Participants in your Fund who are now on a military leave of absence are not included within the purview of this Act as all members who are entitled to participate in this death benefit award must be on the payroll after January 1, 1962, as is set out in Section 55½, paragraph 2.

In response to question number 4. Participants in this Fund who are on a military leave of absence after January 1, 1962, and whose leave continues for more than 60 days after January 1, 1962, are not included within the purview of this Act inasmuch as paragraph 2 in Section 55½ provides for the payment of the death benefit.

"Upon the death of a fireman while on authorized and approved

leave of absence without salary beginning on or after January 1, 1962, provided death occurs within sixty days from the date upon which the fireman was in receipt of salary."

In response to question number 5. Section 55½ makes no provision for the enforced retirement at age 63 and as long as a man is working in the Fire Department he would be entitled to contribute for the death benefit award and would be entitled to receive it if he should die while still a member of the Fire Department.

We believe that the interpretations contained above are true, correct, and proper in connection with the new Death Benefit Award Act passed by the legislature of the 1961 session.

PERMANENT POSITION

*(Retirement Board of the Firemen's Annuity and Benefit Fund—
G. F. M.—February 14, 1962)*

In response to your request for an opinion defining the provisions of Section 61 of the Act governing your Fund, the following is submitted.

Section 61 (Ill. Rev. Stats. 1961, Chap. 24, Sec. 10 Division 9, Article 65) provides as follows:

"No annuity, pension or other benefit shall be paid to any fireman, or to the widow of any fireman, under or pursuant to any of the preceding provisions of this Division 9, general or special, excepting Section 10-9-53, based upon any salary paid to such fireman by virtue of a temporary appointment. All contributions, annuities and benefits shall be related to the salary which shall attach to the permanent position of each fireman concerned. Any fireman temporarily serving in a position or rank other than that to which he has received permanent appointment shall be treated for all purposes of this Division 9 while so serving as though he were serving in his permanent position or rank except that no increase in any pension, annuity or other benefit hereunder shall accrue to any such fireman by virtue of any service performed by him subsequent to reaching any compulsory retirement age provided by law or ordinance. This section shall not apply to any person certified to the fire department by the Civil Service Commission of such city, during the period of his probationary service."

The first portion of this article provides no annuity, pension or other benefit shall be paid to any fireman based on any salary paid to such firemen by virtue of a temporary appointment. A temporary appointment is any appointment other than that to which a fireman has been appointed by virtue of a competitive Civil Service Examination and promotion by appointment from the eligible register of those who passed such examination.

The section further provides that "all contributions, annuities, and benefits shall be related to the salary which shall attach to the permanent position of each fireman concerned."

Permanent position of a fireman can only be that position which he holds by reason of completing a Civil Service Examination and appointment from the eligible register, made up of those passing the examination. From this position he may be removed only by resignation, death, attainment of age 63, or discharge. From any other position, one by reason of temporary appointment, he may be removed by the same power, force, or person that appointed him to such position.

The period of time a fireman occupies a temporary position does not make such position permanent, as there always is the possibility of his removal from such position by means other than the four set out hereinabove.

The last sentence of this article corroborates what is set out above as it specifically exempts from coverage by this section the probation service of a fireman during which time he may be removed without the necessity of any formal charges, or by resignation, or death.

We are, therefore, of the opinion that permanent position means only that position to which a fireman has been appointed as a result of taking a Civil Service Examination and later appointed from the eligible register made up from that examination.

We are also of the opinion that any other position occupied by such fireman must necessarily be a temporary position.

DATE OF BIRTH

*(Retirement Board of the Firemen's Annuity and Benefit Fund—
G. F. M.—March 22, 1962)*

In response to your request for an opinion concerning Michael W. Russo, the following is submitted.

Your letter states and your records show that Michael W. Russo, a fire engineer since October 15, 1941, entered the service of the fire department on March 12, 1935; that a Civil Service application for fireman, being number 338W, indicates that he was born on January 4, 1905; that a Civil Service application for Fire Engineer, being number 5190Y, indicates that he was born on January 4, 1907; and that you desire an opinion as to which date of birth should be used for the purposes of your Act.

The Municipal Code of the State of Illinois (Ill. Rev. Stats. 1961, Chap. 24, Section 24, Division 9, Article 64) provides as follows:

"In the case of any fireman who shall have filed an application for appointment as a member of the fire department of such city, the age stated in such application shall be conclusive evidence of the age of such fireman for the purposes of this Division 9."

The date of birth used in the application made by Mr. Russo on the date of his entry into the Chicago Fire Department on March 12, 1935 must be used for it is "an application for appointment as a member of the Fire Department of such city", and as set out in the above quoted section, became conclusive evidence of his age for the purposes of the Act governing your Fund.

We are, therefore, of the opinion that Mr. Russo's date of birth which must be used for the purposes of the Act governing your Fund is January 4, 1905.

CREDIT FOR FIREMEN'S ANNUITY

*(Retirement Board of the Firemen's Annuity and Benefit Fund—
G. F. M.—March 22, 1962)*

In response to your request for an opinion concerning Michael O'Callaghan, the following is submitted.

Your letter states and your records show that Michael O'Callaghan was a member of the Fire Department of the City of Chicago from January 13,

1944 until January 15, 1954, when he was granted a leave of absence from the Fire Department and became a Junior Fire Prevention Engineer; that during the time he acted as Fire Prevention Engineer, deductions were made from his salary and paid into the Municipal Employees' Annuity and Benefit Fund of Chicago in accordance with the law governing that Fund; that on July 1, 1956, Mr. O'Callaghan's leave of absence was terminated and he was transferred from the Fire Prevention Bureau to the 4th Division as a Fire Engineer, until October 1, 1956, when he again went on leave of absence to accept the position of Fire Prevention Engineer; that on July 16, 1961, his leave of absence was cancelled and he was reinstated as Fire Engineer in the Fire Department; and that he has requested that he be granted credit for the period of time he worked as a Fire Prevention Engineer from January 2, 1954 until July 15, 1961.

The Act governing the Firemen's Annuity and Benefit Fund does not contain within its structure any provision for a grant of credit for service outside the Fire Department except in the Police Department of the City of Chicago, or except as a fireman in territory which is annexed and becomes a part of the City of Chicago. While Mr. O'Callaghan claims credit for this service, alleging that it is within the confines of the Fire Department, Section 2 of the Act governing your Fund provides (Ill. Rev. Stats. Chap. 24, Article 10, Division 9) in part thereof as follows:

"The following words and terms as used in this Division 9 shall mean as follows, respectively:

'Fireman': any person who was, is, or shall be employed by such city in the fire service thereof as a fireman, fire engineer, marine engineer, or fire pilot, and whose duty is to participate in the work of controlling and extinguishing fire at the location of any such fire, whether such person shall be assigned to duty within such fire service other than the actual extinguishing of fire or not * * *

As may be seen from the above definition, the position of Fire Prevention Engineer is not included within those positions covered by the Fireman's Annuity and Benefit Fund Act.

We are, therefore, of the opinion that Mr. O'Callaghan is not entitled to receive credit for his service as a Fire Prevention Engineer from January 2, 1954 until July 15, 1961.

DISABILITY BENEFITS

*(Retirement Board of the Firemen's Annuity and Benefit Fund—
G. F. M.—June 14, 1963)*

In response to your request for an opinion concerning the salary on which ordinary disability benefits should be based, the following is submitted.

Your letter presents a hypothetical case of a fireman who has ten years of service and who is injured October 1, but not in connection with his duties as a member of the Chicago Fire Department; that his injury prevents him from performing duties for four months; that in the following February he is able to perform and is assigned to duties other than the extinguishment of fires; that during the period of time this man did not perform any fire duties from October 1, through the month of January, he was paid his salary by the fire department; that in the month of January he was granted an increase in the salary attached to his rank; and that after he performed the duties of the position to which he was assigned, other than the extinguishment of fires, for the period of eight months, he was removed from the payroll because he was no longer able to perform his duties.

The Act governing the Firemen's Annuity and Benefit Fund of Chicago (Ill. Rev. Stats. 1961, Chap. 24, Art. 10-9-48) provides, in part thereof, as follows:

"Benefit to be known as ordinary disability benefit shall be provided for firemen in the service who shall become disabled as the result of any cause other than the performance of any act or acts of duty and other than as a result of alcoholism or venereal infection . . .

Ordinary disability benefit shall consist of an amount equal to 50% of the salary of such disabled fireman, as such salary shall be at the time such disability shall occur . . ."

The definition section in the Act governing your Fund (Ill. Rev. Stats. 1961, Chap. 24, Art. 10-9-2) provides, in part thereof, as follows:

"'Active Fireman' Any fireman employed as a fireman by such city."

"'Disability': A condition of physical or mental incapacity on the part of the fireman to perform any duty or duties in the fire service of such city which such fireman can be and shall be assigned to perform."

The salary on which ordinary disability benefits is to be based, in accordance with the above-quoted provisions of the Act governing your Fund depends upon the time when this man became disabled and is no longer able to perform the duties of the position to which he is assigned in the service.

Members of the fire department of the City of Chicago perform varied duties in connection with the operation of the fire department. There are a great many firemen who do not directly participate in the extinguishment of fires, such as those in the fire prevention bureau, those in the drill school in connection with instruction of candidates, those who are keepers of the records in the offices of the department, men who drive gasoline trucks, those in the repair shops, and many others. At the time this hypothetical fireman was removed from the payroll, he had been performing duties in the fire department to which he had been assigned. He was then removed from that position because he was no longer able to perform such duties.

The section of the Act quoted above pertaining to the amount of ordinary disability provides it shall be based on the man's salary "as such salary shall be at the time such disability shall occur".

It thus follows that the salary on which ordinary disability benefits should be granted, in a case such as is outlined in your request for this opinion, should be the amount of salary being paid to the fireman in question at the time he was removed from the fire department payroll because he can no longer perform the duties in the department to which he was assigned.

We are, therefore, of the opinion that the grant of ordinary disability benefit made to a fireman should be based on the amount of salary paid to him by the Fire Department of the City of Chicago for the performance of duties in the position to which he was last assigned in the service of such department.

CHILD'S ANNUITY

(Retirement Board, Firemen's Annuity and Benefit Fund—G. F. M.—October 10, 1963)

In response to your request for an opinion concerning the rights of Phyllis and Noreen Sheridan, the following is submitted.

Your letter states and your records show that one Dominic F. Sheridan was granted an age and service annuity by your Fund beginning September 1, 1956; that he died April 12, 1961, and left him surviving his widow, Irmgard J. Sheridan and their two minor children, Phyllis, age 12, and Noreen, age 6; that widow's annuity was granted Irmgard J. Sheridan and children's annuities were granted to Phyllis and Noreen beginning April 13, 1961; that on September 5, 1963, Irmgard J. Sheridan died and left her surviving Phyllis and Noreen Sheridan, minor children and full orphans; and that you have requested a corporation counsel opinion as to the amount of child's annuity which is now payable to Phyllis and Noreen Sheridan by reason of their having become full orphans.

Section 6-147 of the Ill. Pension Code provides in part thereof as follows:

"Section 6-147 'Child's Annuity.' Child's Annuity shall be provided for unmarried natural or adopted children of firemen, payable monthly from the date of the death of the fireman parent of the child until the annuitant attains the age of 18."

Section 6-148 of the Illinois Pension Code provides in part thereof as follows:

"The annuity shall be \$30.00 per month for each child while a widow of the deceased fireman parent of the child survives and \$50.00 per month for each child while no such widow exists . . ."

From the wording contained in the above and foregoing section of the Act, it appears that the legislature realized upon the child becoming a full orphan that it will require a larger amount of money to supply the necessities for such child. Therefore, in its wisdom, the legislature provided that a larger annuity be given to a child upon its becoming a full orphan.

We are, therefore, of the opinion that beginning September 6, 1963, the amount of annuity payable to Phyllis and Noreen Sheridan should be the amount set out in the statutes to be paid to a full orphan, or \$50.00 per month each.

TRUSTEE INJURED

(Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago—G. F. M.—June 22, 1964)

In response to your request for an opinion concerning the liability of the City of Chicago for medical and hospital expenses in the event of accidental injury to Trustees of your Fund, the following is submitted:

Your letter requests an opinion as to whether or not, under the provisions of the Municipal Code of the City of Chicago, the City is responsible for the medical and hospital expenses of a fireman trustee of your Retirement Board who suffers an injury while en route to or from a regularly called meet-

ing of the Retirement Board of your Fund, or while performing other duties in pursuit of his position as a trustee of such Fund. The terminology "while performing other duties in pursuit of his position as Trustee of this Fund" is assumed to mean while performing investigative work in connection with claims made against the Fund.

The Act creating the Firemen's Annuity and Benefit Fund of Chicago provides in part of Section 6-174 thereof (Ill. Rev. Stats. 1963, Chap. 108½, Section 6-174) as follows:

"The Board shall consist of the city treasurer, city comptroller, city clerk, chief fire marshal of the city, three firemen employed by the city and one annuitant of the fund . . ."

The Municipal Code of the City of Chicago provides in Section 22-18 thereof as follows:

"Whenever the City Council shall appropriate a sum or sums of money for the payment of medical care and hospital treatment in case of an accident resulting in an injury to or death of a policeman or fireman employed by the city while in the performance of his duties, . . . the same shall be paid, disbursed and recouped in accordance with the following provisions:"

Section 22-19 provides in part thereof as follows:

"The committee on finance of the city council is hereby authorized, directed and empowered to provide for payment for proper medical care and hospital treatment for accidental injuries sustained by any policeman or fireman, while in the performance of his duties and to that end may recommend to the city council the authorization of the payment of any such necessary expenses."

It follows from the above quoted provisions of the Municipal Code that if any payment of medical or hospital expenses are to be made by the city on behalf of a trustee of a retirement fund, it would apply only to firemen and policemen who are trustees of a retirement board. Inasmuch as the Act governing your fund requires that there be three active firemen members of your Retirement Board in attendance in a meeting of such Board, the administration of the Fund becomes of one of the duties of those firemen who are elected to such position.

It is the practice at the present time in the Fire Department of the City of Chicago for the superior officer of such men who may be members of the Retirement Board of the Firemen's Annuity and Benefit Fund to direct and order such men to be present at any meeting that may be held by the Retirement Board.

As a result of such order and direction and because the Act governing your Fund requires three active firemen be members of the Retirement Board, such men that hold the position of trustee, are in the performance of their duties as firemen when they attend such meeting and when they are in the process of going to or from the place where such meeting is being held.

The Act governing the Firemen's Annuity and Benefit Fund (Ill. Rev. Stats. 1963, Chap. 108½, Section 6-177) provides in part thereof as follows:

"At each regular meeting in December, the Board shall elect by a majority vote of the members who vote on the question, a president, a vice-president, and a secretary from among its own members. The secretary shall be chosen from the active firemen members of the board. Immediately following his election as secretary the fireman shall be detailed to the office of the board by the head of the fire department of the city as an active fireman assigned to such duties . . ."

As secretary of the Retirement Board such fireman's duties encompass a larger field than that that would be performed by those holding only the position of trustee. His duties include attendance at the office of the Fund each day doing necessary paper work, checking up on information and making such investigations as are necessary for the proper conduct of the fund. It further follows that the fireman who is elected to the position of the secretary of the retirement board and performs duties on behalf of the retirement board is covered by the provisions of the Municipal Code during this time, as he is then performing the duties of a fireman because of the requirements of the statute that he be detailed to such duties.

Making an investigation on behalf of the Retirement Board so that the purposes of the Retirement Board might be furthered, does not, however, fall within the scope of duties of a fireman except the fireman who has been elected to the position of secretary of the Retirement Board. A trustee is not required either by the Act which governs your Annuity and Benefit Fund or the rules and regulations of the Fire Department to make such an investigation. Such an investigation could readily be made by someone other than a trustee, whereas the duties of a trustee could not be assumed by an outsider. It therefore follows that a fireman trustee is in the performance of his duties going to, attending or returning from a meeting of the Retirement Board of the Fireman's Annuity and Benefit Fund and should, therefore, at those times, come within the scope of the provisions of the Municipal Code hereinabove set out.

We are, therefore, of the opinion that a fireman trustee of your Fund who is injured while en route to, from, or while attending a Board Meeting would come under the provisions of Sections 22-18, 22-19, 22-20, 22-21 and 22-22 of the Municipal Code, all of said provisions having to do with the payment by the city of medical and hospital care of policemen and firemen employed by the city while in the performance of their duties.

We are further of the opinion that the fireman who holds the position of secretary of your Retirement Board not only comes within the provisions of Sections 22-18, 22-19, 22-20, 22-21 and 22-22 of the Municipal Code when he is en route to and from attending a Board meeting, but also at any time he is performing the duties of the office of secretary of such Retirement Board.

Section C. POLICEMEN'S ANNUITY AND BENEFIT FUND

DUTY DISABILITY PENSIONS

Ass't to President of Civil Service Commission—C. H. L.—January 13, 1961)

We acknowledge receipt of your communication dated January 4, 1961 in which you request our opinion on the question

"Whether or not effective disciplinary action can be taken by the commission against a civil service employee, a policeman who is and was prior to the filing of civil service charges in a Duty Disability status?"

We note your information that the offenses which are the basis for the charges were committed while the said policeman was on Duty Disability.

The civil service status of said policeman is that he is now on Duty Disability, and charges have been filed against him by the head of his department which charges are now pending before the Commission.

The Policemen's Annuity and Benefit Fund Act—cities over 200,000, Chapter 24 of Ill. Rev. Stats. 1957, Section 989, pg. 875 provides:

"989 *Duty disability benefit—disablement in service*)

§ 45 (d) Proof of disability shall be furnished to the retirement board, by at least one licensed physician, appointed by said retirement board, and said retirement board may require other evidence of disability. Each disabled policeman who shall receive any duty disability benefit under the provisions of this section shall be examined at least once a year by one or more licensed and practicing physician or physicians appointed by said retirement board. Such physician or physicians shall advise said retirement board, whether the disability of such policeman continues or not. *When the disability of any such policeman shall cease, the said board shall discontinue payment of duty disability benefit and of child's disability benefit to such policeman and such policeman shall be returned to active service as a policeman.*" (Italics ours.)

It is our opinion that in view of said italicized provision of the Policemen's Annuity and Benefit Fund Act, which are mandatory, nothing, not even a finding of guilty by the Commission after a hearing, can disturb the status of this policeman before his disability has ceased and he has been returned to duty.

EFFECT OF ILLEGAL MARRIAGE

(Retirement Board of the Policemen's Annuity and Benefit Fund of Chicago—G. F. M.—March 9, 1961)

In response to your request for an opinion concerning one of your widow annuitants, the following is submitted.

Your letter states that the annuitant was married to a Police Officer, on March 25, 1949; that on April 7, 1960, the Officer died; that she applied for and received an annuity for herself in the amount of \$58.29 a month, beginning April 8, 1960, together with \$30.00 per month for each of three children, that on December 2, 1960, the widow went through a marriage ceremony with "her second husband", that on January 17, 1961, annuitant discovered that "her second husband" was in fact presently married to another party. You wish an opinion as to whether or not annuitant is entitled to be restored in her position in the Fund after her presentation to a Court of record of such evidence as to reinstate her to her marital status prior to her purported marriage to the said "second husband".

Section 57 (Ill. Rev. Stats. 1959, Chap. 24, Section 1002 a), provides in part thereof as follows:

"Notwithstanding a provision of any other section or sections of this Act to the effect that any annuity for the widow of a policeman shall be a life annuity, any annuity which shall have been credited to the widow of a policeman under and by virtue of a provision of this Act shall terminate when such widow shall marry; * * *

"Neither a divorce from any such husband nor the annulment of any subsequent marriage, nor the death of any subsequent husband shall entitle such widow to receive or be paid any pension or annuity as a widow of her former policeman husband, but the right to any such pension or annuity shall be constituted to have terminated and become extinct upon such subsequent marriage."

There can be no question but what the marriage of a widow of a policeman terminates her annuity without the ability to again be entitled to the same annuity.

However, in this particular instance, annuitant was not married to "her second husband" because "an illegal marriage is no marriage". If annuitant can present sufficient evidence to a Court of law to prove that her alleged marriage to "her second husband" was not a legal marriage but was in fact an illegal marriage, the theory of law set out above will offset the statute.

We are, therefore, of the opinion that if annuitant shall present sufficient evidence to a Court to prove that her marriage to "her second husband" was illegal by reason of his being married at the time of his purported marriage to her, that there was no marriage entered into by annuitant and "her second husband".

We are further of the opinion, that in that instance, annuitant should be reinstated in her status as it was prior to her alleged marriage and further she should continue to be paid an annuity as the widow of her lawful husband and her account should be adjusted so that she shall receive payments for the period of time she has not been paid.

INVESTMENT OF FUNDS IN REVENUE BONDS

*(Retirement Board of Policemen's Annuity and Benefit Fund—
G. F. M.—March 17, 1961)*

In response to your request for an opinion as to whether or not you may invest the monies of the Policemen's Annuity and Benefit Fund in Revenue Bonds of certain universities, the following is submitted.

You have requested an opinion as to whether or not you may invest in Revenue Bonds issued by the following universities for the purposes set out:

University of Illinois, Union and Health Center, Revenue Bonds; Illinois State Normal University, Student Residence Hall, Revenue Bonds; Southern Illinois University, Dormitory and Apartment Revenue Bonds, and Northern Illinois University Dormitory and Student Union Revenue Bonds.

The Act governing your Fund in Section 6 (Ill. Rev. Stats. 1959, Chap. 24, Section 950) provides in part thereof as follows:

"The Retirement Board shall have the power and it shall be the duty of said Retirement Board to:

'(e) invest the monies of said annuity and benefit fund in interest bearing bonds of the United States or the State of Illinois or any county of the State of Illinois or any city, village, incorporated town, municipal corporation, or school district of said state, or in tax anticipation warrants issued by the State of Illinois, or the city in which said annuity and benefit fund shall be operating or the county in which said city is located or of any school district within the said city * * *."

While the words "Revenue Bonds" are not specifically set out, Revenue Bonds are interest bearing bonds and are not in our opinion barred for investment.

Bouvier's Law Dictionary defines Municipal Corporation as a "public corporation created by the government for political purposes and having subordinate and local powers of legislation."

"There are territorial sub-divisions not incorporated, which are like municipal corporations, instrumentalities of local government for certain definite purposes. These are known as 'quasi corporations'."

Words and Phrases holds :

"A municipal corporation has but two kinds of power, governmental and public; that municipal corporations are political sub-divisions of the State, and the word municipal applies strictly to what belongs to a city or pertains to a city or a community within the state possession the right of self-government."

(Citing 247 Illinois Appellate, 58-64.)

After considering the definitions pertaining to the make-up and qualifications of municipalities, we are of the opinion that none of the universities mentioned qualify as a municipality. They have no legislative powers nor do they have any taxing powers. They are supported by the payment of tuition of students who attend them and grants made to them by the legislature.

As these universities do not qualify as municipal corporations, we are, therefore, of the opinion that such bonds issued by them do not come within the scope of investments provided for in the investment provision of your Fund.

DISABILITY BENEFITS—EFFECT OF SUBSEQUENT EMPLOYMENT

*(Retirement Board of the Policemen's Annuity and Benefit Fund—
G. F. M.—December 5, 1961)*

In response to your request for an opinion concerning one Michael R. Dore, the following is submitted.

Your letter states and your records show that Michael R. Dore was born on June 29, 1908; that he became a member of the Police Department on September 24, 1938; that his service as a policeman was uninterrupted and effective until February 16, 1960; that he was then granted ordinary duty disability benefits by your Board as a result of a fractured right hip; that this fractured right hip was not the result of an injury received in performance of an act of duty; and that on March 1, 1961, Michael R. Dore secured for himself a job in the State's Attorney's office where he is paid a salary of \$395.00 a month.

You requested an opinion as to whether or not Michael R. Dore would be entitled to receive the duty disability benefits granted by your Board.

Section 47 of the Act governing the Policemen's Annuity and Benefit Fund (Ill. Rev. Stats. 1959, Chap. 24, Section 991) provides in part thereof as follows:

"No disability benefits shall be allowed to any member of this Fund who has re-entered or shall re-enter the public service in any capacity or in any department thereof, where the salary of such person is payable out of money raised in whole or in part by taxes levied upon taxable property in the city in which this Act is in force and effect, or out of the revenue of any department of such city; in payment of any disability benefit granted to such policeman and payable out of this Fund shall be suspended while such policeman shall be in the public service or working in such department and shall be resumed when such policeman shall resign or be discharged from the service of such department."

We are, therefore, of the opinion that during the time that Michael R. Dore is employed in the office of the State's Attorney, that ordinary disability benefits should be suspended.

POLICE EXECUTIVES

(Superintendent of Police—G. F. M.—January 16, 1962)

In response to your request for an opinion concerning a number of Police Department Employees holding executive positions in the department, the following is submitted.

Your letter states that there are a number of executive positions in the Police Department, such as

- Superintendent of Police
- Aide to the Superintendent
- Executive Assistant to the Superintendent
- Director of Planning
- Director of Personnel
- Fiscal Officer
- Director of Public Information
- Director of Training
- Director of Automobile Maintenance

who are not participating in the Policemen's Annuity and Benefit Fund of Chicago (Pension Fund).

You have requested an opinion as to whether or not these men are entitled to participate in the Policemen's Annuity and Benefit Fund of Chicago, and if they are, what steps should be taken by them to establish such participation.

The Act governing the Policemen's Annuity and Benefit Fund provides in Division 7 of the Municipal Code (Ill. Rev. Stats. 1961, Chap. 24, Section 10-7-2) as follows:

"The following words and terms as used in this Division 7 mean as follows, respectively:

'Policeman': any person appointed and sworn or designated by law as a policeman of such city, and who has served, or is serving, or shall serve in the regularly constituted police department of such city as a policeman, or policewoman, or police patrol driver, or police operator, or chief surgeon, or police surgeon or drillmaster, or identification officer, or secretary of such police department, or police dog catcher, or police kennelman, or police matron, and member of the police force of such police department.

The term 'policeman' also includes any policeman of a park district transferred to the employment of a city under the consolidation act."

As none of the men holding the executive positions described in your letter fall within the definition of 'policeman', we are, therefore, of the opinion that they are not entitled to participate in the Policemen's Annuity and Benefit Fund of Chicago.

QUALIFICATIONS FOR CREDIT

*(Retirement Board of the Policemen's Annuity and Benefit Fund—
G. F. M.—February 15, 1962)*

In response to your request for an opinion concerning the rights of Lt. Thomas Neill Ryan to receive credit in your Fund for service performed as Chief of Police of the Skokie Police Department, Skokie, Illinois, the following is submitted.

Your letter states and your records show that Lt. Thomas Neill Ryan was born September 14, 1905; that he became a member of the Chicago Police Department on December 23, 1932; that on October 14, 1960, he was granted a leave of absence to accept a position as Chief of Police of the Skokie Police Department, Skokie, Illinois; and that on December 16, 1961, Lt. Ryan was reinstated to his former rank as Lieutenant of Police in the Chicago Police Department. You have requested an opinion as to whether or not Lt. Ryan may pay into your Fund a sum equivalent to the deductions which would have been made from his salary for annuity purposes had he been a contributor to this Fund during the time he was Chief of Skokie Police Department and receive credit for this period of time towards retirement annuity.

Section 41½ of the Act governing your Fund (Illinois Municipal Code, Section 10, Division 7, Article 46) provides in part thereof as follows:

"Any contributor to and participant in this fund (other than a member of the fire department of such city) who has served or shall hereafter have served as a member of the police department of such city for a period of 10 or more years and who, prior to becoming such member or while on leave of absence from the police department while assigned or detailed to investigative, protective, security or police work while employed either in the park district of such city or in the sanitary district in which such city is located, or as a temporary police officer in such city or the office of the mayor, the office of corporation counsel of the city in which such police department is located, the board of election commissioners, or while performing safety or investigative work for the county in which such city is principally located and for the State of Illinois, while on leave of absence from the department of police, and was a contributor to and a participant in any pension fund or in any other annuity and benefit fund existing in such city by operation of law shall have the right to pay into the annuity and benefit fund herein provided for, an amount equal to the sum which would have accumulated to the credit of such policeman in this fund from deductions from his salary for annuity purposes on the date when such payment shall have been made into this fund if such policeman had been paying into the annuity and benefit fund herein provided for such sums as he actually paid into such pension fund or into such other annuity and benefit fund, provided no credit shall be granted to this fund if such policeman shall have credit in any other annuity and benefit fund for any such service; * * *

Lt. Ryan's service in the Skokie Police Department is not covered by the above quoted section. He is not entitled to pay into your Fund for the period of time he was on leave of absence from the Police Department and acting as Chief of Police of Skokie Police Department.

We are, therefore, of the opinion that Lt. Thomas Neill Ryan cannot be granted any credit in your Fund for the period from October 14, 1960 to December 16, 1961 during which time he was Chief of Police of the Skokie Police Department, Skokie, Illinois.

RETIREMENT BOARD'S SECRETARY

(Retirement Board of the Policemen's Annuity and Benefit Fund of Chicago—G. F. M.—March 6, 1962)

In response to your request for an opinion as to whether or not certain expenses of the Recording Secretary of your Fund may be paid by the Retirement Board of the Policemen's Annuity and Benefit Fund of Chicago, the following is submitted.

Your request for the opinion tells of the various wakes that are attended by the Recording Secretary, at which time information and assistance is given to the widow of such deceased policeman; that these widows are very confused at the time of the wakes and this help that is given to them by the Recording Secretary straightens them out, saves them time and trouble, as well as saving time and trouble for the Fund at the time the widow comes in to make application for her widow's annuity; and that as a result of the attendance at these various wakes the Recording Secretary has found himself to be paying expenses which he believes should be assumed by the Fund.

The Board therefore has requested an opinion as to whether or not the Recording Secretary may be reimbursed for such out of pocket expenses as he may encounter in attending these wakes for the purpose of assisting the widows of deceased policemen.

The Municipal Code of the State of Illinois (Ill. Rev. Stats. 1961, Chap. 24, Section 10, Division 7, Article 8) provides in part thereof as follows:

"The Retirement Board shall have the power and it shall be the duty of said Retirement Board to:

n. make rules and regulations necessary for the proper conduct of the affairs of such annuity and benefit fund".

Under the above quoted sections of the Act, the Retirement Board has the right to reimburse the Recording Secretary or any other individual employee, or trustee of the Fund that represents the Board at these wakes, for such out of pocket expenses as such representative may incur.

It is, therefore, our opinion that the Retirement Board has the right to reimburse the usual and customary expenses encountered in attending the wakes of deceased policemen by the Recording Secretary of this Fund.

CREDIT FOR DISABILITY BENEFITS

(Retirement Board of the Policemen's Annuity and Benefit Fund—G. F. M.—November 1, 1962)

In response to your request for an opinion concerning the payment of ordinary death benefits to the beneficiary of Nicholas M. Connelly, the following is submitted.

Your letter states that Nicholas M. Connelly was born September 30, 1907, and became a member of the Police Department of the City of Chicago on October 13, 1933; that on September 23, 1936, he was shot by a stick-up man and was carried on the Police Department medical payroll until October 16, 1937, when he was placed on the disability benefit roll of this Fund; that

Mr. Connelly continued to receive duty disability benefits until February 1, 1962, when he resigned from the Police Department; that he was granted a life annuity of \$260.39 per month beginning February 1, 1962; that on October 9, 1962 he died.

The Act governing the granting of ordinary death benefits was passed by the legislature in the year 1961 and provided in part thereof, as follows:

"(a) Effective January 1, 1962 an ordinary death benefit is hereby established to be payable on account of any policeman in service and in receipt of salary on or after such date, in addition to all other annuities and benefits provided in this Act. This benefit shall be payable under the following provisions:

(5.) Upon death of a policeman occurring while on retirement and while in receipt of an age and service or prior service annuity; provided resignation or discharge from the service for retirement on such annuity occurred on or after January 1, 1962, and such separation from service was effective on or after the Policeman's attainment of age 50; and provided further application for such annuity was made within 60 days after separation from service;"

The section of your Act having to do with computation of service (Ill. Rev. Stats. 1961, Chap. 24, Article 10-7-55) provides in part thereof as follows:

"In computing the terms of service rendered by any Policeman subsequent to December 31 of the year in which this Division 7 takes effect in such city, the following periods of time shall be counted, in addition to all periods of time during which such Policeman shall have performed the duties of his position, his periods of service, for annuity purposes only * * * all periods of disability for which such policeman shall receive any disability benefits; and all periods of disability for which the policeman concerned shall receive whole or part pay."

It is to be noted in the above section that credit is given to Policemen for annuity purposes for any period of time while in receipt of disability benefits. Disability benefits are paid to a Policeman while he is disabled in lieu of the salary he would receive if he was not disabled. Surely it cannot be said that it was the intention of the legislature to deprive men in receipt of duty disability or ordinary disability benefit the right to have their beneficiaries receive the ordinary death benefit because these men have been disabled and were not able to return to the active service and receive the salary attached to their position in the service, particularly as their disability or injury might contribute to or be the cause of their death. In this instance, it must be considered that the receipt of disability benefits by Nicholas Connelly as a result of a performance of an Act of Duty is the same as though he received the salary attached to his position in the service, as such disability benefit is paid in lieu of salary.

We are, therefore, of the opinion that the beneficiaries of a Policeman who dies while in receipt of disability benefits or who retires after January 1, 1962, from ordinary or duty disability benefits, is entitled to have his beneficiaries receive the ordinary death benefits provided in this Act.

EFFECT OF RE-ENTERING PUBLIC SERVICE

*(Retirement Board of the Policemen's Annuity and Benefit Fund—
G. F. M.—February 15, 1963)*

In response to your request for an opinion as to whether or not Michael R. Dore is entitled to receive service credits, the following is submitted.

Your letter states and your records show that Michael R. Dore is a member of the Police Department of the City of Chicago; that he was granted ordinary disability benefits because his condition was such that he was no longer able to perform the duties of his position in the Police Department; that he applied for and received a position in the State's Attorney's Office in the County of Cook and has continued to work at such position from the date he first secured it until the present date; that by reason of the provision of Section 47 of the Act governing your Fund (Ill. Rev. Stats. 1961, Chap. 24, Section 10-7-52) he is not being paid any disability benefits and you request an opinion as to whether or not he is entitled to receive credit in your Fund for the period of time he is carried on the disability roll even though he is not being paid any disability benefits.

Section 47 of the Act governing your Fund (Ill. Rev. Stats. 1961, Chap. 24, Section 10-7-52) provides in part thereof as follows:

"No disability benefit shall be allowed to any member of this Fund who has re-entered or shall re-enter the public service in any capacity or in any department thereof, where the salary of such person is payable out of money raised in whole or in part by taxes levied upon taxable property in the City in which this Division 7 is in force and effect, or out of the revenue of any department of such city; and payment of any disability benefit granted to such policeman and payable out of this fund shall be suspended while such policeman shall be in such public service or working in such department and shall be resumed when such policeman shall resign or be discharged from such service or from such department."

Michael R. Dore was granted ordinary disability benefits under Section 46 of the Act governing your Fund (Ill. Rev. Stats. 1961, Chap. 24, Section 10-7-51) which provides in part thereof as follows:

"Ordinary disability benefit shall consist of any amount equal to 50% of the salary of such disabled policeman, as such salary shall be at the time such disability shall occur, for a period of time equal to any period of time for which any payment of such disability benefit shall become due and payable. Before any payment thereof shall be made to any policeman, an amount equal to the sum or sums ordinarily deducted from the salary of such policeman for all annuity purposes during a period of time equal to that for which such payment of ordinary disability benefit is to be made shall be deducted from such payment and credited to such policeman as a deduction from his salary for such period."

As it is a requirement of the Act governing your Fund that deductions shall be paid into your Fund during any period of ordinary disability and as no deductions are being paid into your Fund on behalf of Michael R. Dore while an employee of the State's Attorney's Office of Cook County, it follows that he would not be entitled to receive credit for the period of time he would ordinarily receive ordinary disability benefits.

Section 41½ of the Act governing your Fund (Ill. Rev. Stats. 1961, Chap. 24, Sec. 10-7-46) provides in part thereof as follows:

"Any contributor to and participant in this Fund * * * who has served or shall hereafter have served as a member of the Police Department of such city for a period of 10 or more years and who prior to becoming such member or while on leave of absence from the Police Department while assigned or detailed to investigative, protective, security or police work, while * * * performing safety or investigative work for the county in which such city is principally located * * * shall have the right to pay into the annuity and benefit fund herein provided for, an amount equal to the sum which would have accumulated to the credit of such policeman in this fund from deductions from his salary for annuity purposes on the date when such payment shall have been made into this fund if such policeman had been paying into the annuity and benefit fund herein provided for * * *; provided further such policeman shall contribute directly to the annuity and benefit fund created by this Division 7, the amount of contributions he would have contributed had such contributor remained an active member of the Police Department of such city."

We are, therefore, of the opinion that while Michael R. Dore is not entitled to receive service credit in your Fund during the period of time he would receive ordinary disability benefits if it were not for the fact that he was working for the County, he is nevertheless, under the provisions of Section 41½ of the Act governing your Fund, entitled to receive credit for such period of time upon his making the contributions he would have made had he remained in the Police Department.

AGE ON APPLICATION CONCLUSIVE

*(Retirement Board of the Policemen's Annuity and Benefit Fund—
G. F. M.—March 28, 1963)*

In response to your request for an opinion concerning James F. Howard, the following is submitted.

Your letter states and your records show that James F. Howard was a Policeman in the Chicago Park District and a member of the Park Police Annuity and Benefit Fund prior to the merger of that Board with yours; that the date of birth of James F. Howard was changed from February 24, 1900 to February 24, 1903 as evidenced by a report from the Civil Service Board of the Chicago Park District, which was approved in a meeting of May 4, 1944; that on February 24, 1963, the Civil Service Commission of the City of Chicago, which assumed jurisdiction of the members of the Chicago Park District Police Department, retired James F. Howard using as his date of birth February 24, 1900. You have requested an opinion as to what date of birth should be used for the purposes of your Act in the above matter.

Section 55 of the former Park Police and Retirement Board Employees' Annuity and Benefit Fund (Ill. Rev. Stats. 1959, Chap. 105, Sec. 338) provides in part thereof as follows:

"In the case of any policeman or retirement board employee who shall have filed an application for appointment as a member of the Police Department of any Park Board or Retirement Board employee as defined in this Act, the age stated in such application shall be conclusive evidence of the age of such policeman or retirement board employee for the purposes of this Act, in the absence of fraud, or of a certificate of birth or of other evidence as to age satisfactory to the board."

In accordance with the provisions of the above section, it appears that James F. Howard presented evidence satisfactory to the Board that his date of birth was February 24, 1903.

In the year 1959 the legislature passed an Act merging the Park Police and Retirement Board Employees' Annuity and Benefit Fund with your Fund. A portion of the Act which merged this Fund into your Fund provides in part thereof (Ill. Rev. Stats. 1961, Chap. 24, Sec. 10-7-57) as follows:

"* * * All of the participants of the superseded fund shall have the same rights and benefits and be subject to the same duties and responsibilities as if they had originally been participants of the fund herein provided for from the first date of their employment as members of the active service in the Police Department of any Park District, or as a Retirement Board employee of such superseded fund."

The Act governing your Fund at one time provided for policemen to correct their dates of birth in your Fund by the proof of evidence satisfactory to the Board that their date of birth as it appears in your records was incorrect. After the determination of the proper date of birth your Fund has used such date of birth for that member of your Fund. The same should be applied in this case. James F. Howard corrected his date of birth on the Fund records in accordance with the law as it existed at the time he made such change. Such corrected date of birth should, therefore, be the one used by your Fund in determining benefits which may be payable to the said James F. Howard.

We are, therefore, of the opinion that the proper date of birth to be used for James F. Howard is February 24, 1903.

EFFECTS OF DISABILITY BENEFITS ON ANNUITY

*(Retirement Board of the Policemen's Annuity and Benefit Fund—
G. F. M.—July 10, 1963)*

In response to your request for an opinion concerning one John E. McGlynn, the following is submitted.

Your letter states and your records show that John E. McGlynn was born May 24, 1912; that he entered the Police Department April 1, 1941; that on February 18, 1955, he applied for and was granted ordinary disability benefits; that he remained on such ordinary disability benefits for the entire period of time allowable to him under the provisions of the Act governing your fund, or until August 1, 1958; that on August 1, he was removed from the disability benefit roll; that instead of resigning he took a leave of absence from the Police Department; that such leave of absence was extended by him from time to time until he resigned from the Department on June 10, 1963; and that Mr. McGlynn has applied for his annuity from your fund and requested that his annuity begin as of August 1, 1958, the date his ordinary disability benefits expired.

The ordinary disability benefits provision of the Act governing your fund, Ill. Rev. Stats. 1961, Chap. 24, Sec. 10-7-51, as amended by the 73rd General Assembly in Senate Bill 72, effective July 1, 1963 and now known as Section 5-158 of the Illinois Pension Code, provides in part thereof as follows:

"A policeman whose disability continues beyond the maximum period of eligibility for disability benefit and who withdraws while still disabled and before age 50, shall receive annuity as can be provided from the amounts accumulated from salary deductions and sums contributed by the city for his retirement annuity. The annuity shall be computed as of the age of the policeman on the date of his withdrawal."

Section 5-129 of the new Illinois Pension Code, effective July 1, 1963, (formerly Chap. 24, Sec. 10-7-32) provides in part thereof as follows:

"Sec. 5-129. When a future entrant who attains age 50 or more in service, having 10 or more years of service, and withdraws before age 57, his age and service annuity shall be fixed as of his age at withdrawal. He is entitled to annuity, after withdrawal, of the amount provided from the following sums on the date of withdrawal:

(2) If service is 10 or more but less than 20 years, the sum accumulated for age and service annuity from employee contributions, plus 1/10 of the sum accumulated for such purpose from contributions by the city, for each completed year of service after the first 10 years."

It is to be noted in both of the sections hereinabove set forth that the annuity is to be based upon the age of the applicant at the time of his withdrawal from the service. Inasmuch as Officer McGlynn withdrew from the service on June 10, 1963, by means of a resignation effective on that date, it necessarily follows that his annuity should begin as of June 10, 1963.

We are therefore of the opinion that the effective date of starting the annuity of Officer John E. McGlynn should be June 10, 1963.

EFFECT OF SURVIVING WIDOW ON CHILD'S ANNUITY

*(Retirement Board, Policemen's Annuity and Benefit Fund—G. F. M.
—August 29, 1963)*

In response to your request for an opinion concerning the amount of Child's Annuity payable to Stephan D. Cychosz, the following is submitted.

Your letter states and your records show that Ernest D. Cychosz, a member of the Police Department, died January 10, 1963; that he left him surviving one minor child, Stephan D. Cychosz, who was born November 12, 1957; that Ernest D. Cychosz had been married to Yvonne L. Burton on July 7, 1952; that on November 30, 1959, Ernest D. Cychosz and Yvonne Cychosz were divorced in the Superior Court of Cook County; that Mrs. Cychosz remarried, her name now being Mrs. Yvonne Spence; and that as the mother of Stephan D. Cychosz, she made the application for Child's Annuity.

Section 10-7-49 of Chap. 24 of the Ill. Rev. Stats. 1961, provides in part thereof as follows:

"Child's Annuity as hereinafter provided, shall be granted and paid for the benefit of any unmarried child less than 18 years of age, either the issue of any following described policeman. . . .

. . . Any policeman who shall die while in the service from any cause; . . .

Any such annuity shall consist of amounts of . . . \$30.00 per month . . . for each child while a widow or widower of the deceased policeman parent of such child shall survive, if such widow or widower be the natural or adopted parent of such child, . . . or \$60.00 a month for any such annuity granted . . . while no such widow or widower exists."

At the time of the death of Ernest D. Cychosz, he left him no widow surviving, his wife having been divorced in the year 1959.

It therefore follows that the amount of annuity payable to Stephan D. Cychosz would be the amount payable when no widow of a deceased policeman survives.

We are therefore of the opinion that the amount of annuity payable to Stephan D. Cychosz should be \$60.00 per month.

APPEALING CONSTITUTIONALITY OF SERVICE CREDITS

*(Retirement Board of the Policemen's Annuity and Benefit Fund—
G. F. M.—September 3, 1963)*

In response to your request for an opinion concerning your financial participation in the appeal in a certain case, the following is submitted.

Your letter states that in the year 1959, the General Assembly of the State of Illinois passed legislation giving to policemen who were on the eligible register on December 7, 1941, and who prior to their becoming members of the police department were inducted into the military forces of the United States, credit for such time that they served in the military services. A suit testing the constitutionality of the law was filed against your Fund by Noble W. Lee and Palmer Edmunds, being case No. 60 C 19037. After numerous hearings the decision that the Act amending your Fund was unconstitutional was decreed by the Hon. Thomas Kluczynski on June 11, 1963.

The men who were affected by this particular amendment to the law had appeared as intervenors in the case and after the decision by Judge Kluczynski, they banded together and decided that an appeal should be made. On a report being made to the Retirement Board of the decision of Judge Kluczynski, the Board did not decide to appeal the case inasmuch as the intervenors were appealing it and as the Board had never passed upon nor been contacted at the time the legislation had been submitted to the General Assembly. The members of the committee formed by the intervenors for the purpose of raising money for the appeal have contacted your Board and requested aid in paying for the appeal. They stated that they had raised among themselves \$3,000.00 and have been promised the further sum of \$1,500.00 by the Policemen's Annuity and Benefit Fund Protection Association, (a police organization), provided the Board will participate in the appeal in a like amount.

Your question is whether or not under the provisions of the Act governing your Fund your Board has the right to participate in such an appeal to the extent requested. There can be no question but had your Board decided that an appeal should be taken in this case on behalf of the Board, that the Board would have the right to pay such costs in connection with such an appeal as would be necessary.

As the appeal by the intervenors is being made on behalf of the Retirement Board, who is the principal defendant in this case, the Board has the right to assist the intervenors in their attempt to sustain the constitutionality of the law which governs this Fund, as it was amended in the year 1959 by the General Assembly of Illinois, the General Assembly being the sole judge as to what should constitute the make-up of the law. The amount of financial assistance, however, should not exceed the sum of \$1,500.00 requested. Any money paid by this Board can be paid to the printer for printing the abstracts and briefs, only at the time the bills are submitted, as part of the costs and not as attorney's fees.

We are, therefore, of the opinion that the Retirement Board of the Policemen's Annuity and Benefit Fund of Chicago as the principal defendant in this case, has the right to expend the sum of not to exceed \$1,500.00 in payment of the printing bills for abstracts, briefs and reply briefs and if necessary, a petition for rehearing.

REFUND

*(Retirement Board, Policemen's Annuity and Benefit Fund—G. F. M.
—October 10, 1963)*

In response to your request for an opinion concerning Walker H. Ijams, the following is submitted.

Your letter states that Walker H. Ijams became a member of the Police Department on May 29, 1943; that he resigned December 5, 1947, at which time he applied for and received a refund of the deductions made from his salary made for annuity purposes; that he was reinstated in the Police Department on June 19, 1957; and that on September 24, 1957, he repaid into your fund the amount refunded to him together with interest at the rate of 4% per annum.

Your question is as to whether or not this participant's annuity should be figured on a 3% or 4% basis.

Section 39 of the Act governing your fund, Ill. Rev. Stats., 1957, Chap. 24, Section 983 (3), provides in part thereof as follows:

"Any such policeman who shall have applied for and received refund of the amount so credited to him for age and service annuity and widow's annuity purposes from deductions from his salary shall ipso facto surrender and forfeit all rights to any annuity or other benefit from the annuity and benefit fund herein provided for, for himself and for any other person or persons who might benefit through him because of service rendered by him prior to the time he shall have made application for refund of the amounts hereinbefore referred to, unless such policeman . . . shall have made full repayment to this fund in accordance with the provisions of paragraph (f) and/or (g) of this section, of the amount or amounts previously refunded to such policeman, in which event the rights . . . so surrendered and forfeited shall be restored to such policeman, his wife or widow and his children, notwithstanding any other provisions in this Act contained."

"(g) Any such policeman who shall have applied for and received the refund provided for in this section and shall have subsequently reentered the service, shall have the right . . . to repay into this fund an amount equal to any sum which such policeman shall have received as a refund under and by virtue of the provisions of this section, together with interest thereon from the date such payment of refund was made until the date or dates such amount is repaid into this fund, provided that such repayment shall be made in full by such policeman . . . within one year from July 1, 1929. . . ."

Walker H. Ijams reentered the service on June 19, 1957, and on September 24, 1957, repaid the refund that he had received together with interest at 4%. As Mr. Ijams met the requirements of paragraph (g) of Section 39, he was automatically restored to all rights and privileges that had existed with him prior to the date of his application for and receipt of the refund.

Section 12 of the Act governing your Fund, Ill. Rev. Stats., 1947, Chap. 24, Sec. 956, provides in part thereof as follows:

"'Interest.' Wherever the word interest appears in this Act, such word shall mean and signify interest at the rate of 4% per annum in the case of any future entrant or employee who was or is a contributor of this Fund on December 31, 1953, and interest at the rate of 3% per annum in the case of any future entrant who is not or was not a participant or contributor of this Fund on December 31, 1953, but who became a participant or contributor after December 31, 1953."

While it would appear from the above definition of interest that Mr. Ijams would ordinarily be qualified as a 3% participant in this Fund, nevertheless, by reason of Mr. Ijams repaying the refund that he received from your Fund, in accordance with the provisions of the Act, he was reestablished as a participant or contributor prior to December 31, 1953, and thus should be entitled to have his accounts improved with interest at the rate of 4% per annum.

We are, therefore, of the opinion that Mr. Walker H. Ijams' annuity should be figured on a 4% interest basis.

EFFECT OF ILLEGAL DISCHARGE

*(Retirement Board of the Policemen's Annuity and Benefit Fund—
G. F. M.—January 6, 1964)*

In response to your request for an opinion concerning one James A. Aman, the following is submitted:

Your letter states, and your records show that James A. Aman was born June 15, 1906; that he joined the Police Department March 25, 1933; that on December 16, 1951 he was promoted to the rank of Sergeant; that on June 14, 1952 he was suspended from the service and on December 28, 1962 he was discharged from the Police Department.

On December 4, 1963 an order was issued by the Personnel Section of the Police Department for the Superintendent of Police which restored Sergeant Aman to the active service of the Police Department of the City of Chicago, in accordance with an Order entered in the Circuit Court of Cook County, being case No. 63 C 1174; an appeal was perfected from the Order of the Circuit Court. Negotiations were then entered into by the City with James A. Aman, and a Stipulation dismissing the appeal (case No. 49357, Appellate Court, First District) was entered into. This Stipulation provided for the payment to James A. Aman of the sum of \$6,594.01 as payment in full of wages, salaries and earnings that were due him for his illegal suspension and discharge from the Police Department, which amount is the approximate amount due the Retirement Board of the Policemen's Annuity and Benefit Fund of Chicago to make James A. Aman eligible for pension, representing as it does, the approximate amount of salary deductions that would have been made from Aman's salary as Sergeant of Police from the date of his suspension on June 14, 1952 to and including November 30, 1963.

Your question is whether or not James A. Aman is entitled to credit in your Fund as though he had served in the Police Department for the period of June 14, 1952 to November 14, 1963. Based on the legal theory, which has been sustained many times, that an illegal discharge is not a discharge, an individual so discharged and restored to duty is entitled to receive credit just as though he had served during this period.

Based on this same theory, an illegal suspension based on the same facts as the discharge, cannot be considered to be a suspension and credit must also be allowed for the period of time that a man is illegally suspended.

It appears from the Order issued by the Personnel Section of the Police Department dated December 4, 1963 and from a letter of the City of Chicago Law Department addressed to the Superintendent of Police, dated November 14, 1963, together with the Order of Court that the suspension was illegal that there was a possibility of the City being required to pay Sergeant Aman for the entire period of suspension and discharge if judgment was affirmed by the Appellate Court. For that reason the negotiations aforementioned and stipulation were entered into.

As both the suspension and discharge of Sergeant Aman were illegal, it follows that Sergeant Aman would be entitled to receive credit for service in the Police Department of the City of Chicago for this period of time upon his paying into your Fund the amount of salary deductions that would have been made from his salary for Annuity purposes, together with interest at the rate of 4% thereon from the time each payment would have been made, until such payments are made, had he been in active service from June 14, 1952 to and including the date of his restoration to service in the Police Department of the City of Chicago.

PARTICIPATION IN DEATH BENEFIT AFTER SUSPENSION

*(Retirement Board, Policemen's Annuity and Benefit Fund—G. F. M.
—February 3, 1964)*

In response to your request for an opinion concerning the rights of James A. Aman to participate in the Death Benefit plan of your fund, the following is submitted:

James A. Aman became a member of the Police Department March 25, 1933; on June 14, 1952 he was suspended from service and on December 28, 1962 he was discharged.

James A. Aman was later reinstated by order of the Circuit Court of Cook County (Case No. 63 C 1174). The City appealed the case and later withdrew the appeal upon a stipulation entered into by the city and Mr. Aman. He waived his salary for the period of suspension and discharge and the city paid to him a sum equal to the amount of salary deductions for annuity purposes for such period, together with interest thereon. An opinion rendered by this department held that Mr. Aman was entitled to credit in your fund for the period of suspension and separation from the service, upon his paying into your fund the amount of salary deductions that would have been made from his salary for Annuity purposes, together with interest of 4% thereon from the time each payment would have been made until such payments were made.

The death benefit provisions of your Act (Ill. Rev. Stats. 1963, Chap. 108½, Sec. 5-153) provides, in part thereof, as follows:

"Effective January 1, 1962 an ordinary death benefit shall be payable on account of any policeman in service and in receipt of salary on or after such date, which benefit shall be in addition to all other annuities and benefits herein provided. This benefit shall be payable upon the death of a policeman. . . ."

While it is true Mr. Aman was not actually in the service on January 1, 1962, nor was he in receipt of salary at that time, it was because he had been suspended from the service. This suspension and discharge were later held by the Circuit Court to be illegal. Mr. Aman later waived his salary in the aforementioned stipulation, which can only mean that he was entitled to receive it because one cannot waive that which they are not entitled to receive. It therefore follows that Mr. Aman would have been in the service of the Police Department of the City of Chicago on January 1, 1962 and in receipt of salary at that time if it had not been for the illegal suspension and discharge.

We are therefore of the opinion that Mr. Aman is entitled to participate in the death benefit plan of your Fund upon his paying into your fund an amount equal to the deductions for death benefit purposes that would have been made from his salary from January 1, 1962 until the date of his termination of his service, together with interest thereon at the rate of 4%.

PRIOR STATUS IN BOARD OF EDUCATION

(Retirement Board of the Policemen's Annuity and Benefit Fund—G. F. M.—June 24, 1964)

In response to your request for an opinion concerning Dorothy P. McCune, a member of your Fund, the following is submitted:

Your letter states and your records show that Dorothy B. (Kearney) McCune was born September 7, 1919; that she became a member of the Police Department on January 24, 1954; that prior to becoming a member of the Police Department of the City of Chicago she was employed by the Board of Education in the City of Chicago as a civil service employee from January 17, 1949 through January 3, 1954; that policewoman McCune has asked permission to pay into your Fund a sum equivalent to the deductions that would have been made from her salary for annuity purposes had she been a contributor to the Fund during the period of her service as a clerk for the Board of Education and receive therefor credit for such service; and that you have requested an opinion as to whether or not she may make such payments.

Your file discloses that in January of 1959 a notice was sent through police channels to all districts, which notice was read at all rollcalls and placed upon the bulletin board for the information of all personnel in such district. This notice informed all members of the Department that legislation was being introduced at the General Assembly of the State of Illinois for the purpose of limiting service credits for work done in other occupations to investigative or security work. The legislation mentioned in the notice was presented to the General Assembly of the State of Illinois and on June 17, 1959 it was approved by the Governor. The legislation became effective on July 1, 1959.

In the year 1959 the Act governing your Fund (Ill. Rev. Stats. 1959, Chap. 24, Sec. 985a.) provided in part thereof as follows:

"Any contributor to and participant in this fund . . . who has served or shall hereafter have served as a member of the Police Department of the City for a period of ten or more years and who, prior to becoming such member or while on leave of absence from the Police Department, while assigned or detailed to investigative, protective, security or police work while employed either in the Park District of such city or in the Sanitary District in which such city is located or as a temporary police officer in such city or the office of the Mayor, the office of the Corporation Counsel of the city in which such Police Department is located or the Sheriff's office, the Board of Election Commissioners, or while performing safety or investigative work for the State of Illinois, while on leave of absence from the Department of Police; provided no credit shall be granted in this fund if such Policeman shall have credit in any other annuity and benefit fund for any such service; provided further such Policeman shall contribute directly to the annuity and benefit fund created by this Act, the amount of contributions he would have contributed had such contributor remained an active member of the Police Department of such city. . . . The period of service rendered by such Policeman prior to the date on which such Policeman became a member of the Police Department of such city or while detailed, assigned or on leave of absence and employed in any of the departments hereinabove in this section set out and for which such Policeman has contributed or paid into this Fund shall be credited to such Policeman as a period of service for all purposes of this Act excepting that such Policeman shall not have any of the rights conferred by the provisions of Section 55 and 55½ of this Act."

On July 9, 1959 when Mrs. McCune apparently applied for permission to pay for and receive credit for her period of service as a school clerk the law was as above set out and did not permit the granting of such credit.

At the present time the provisions of the Act granting credit for other services to the City does not permit the granting of credit for service as a school clerk. While the language of Section 41½ has been modified to some extent by the recent pension code, this section of the Act (Ill. Rev. Stats., 1963, Chap. 108½, Sec. 5-214) remains essentially as it was in 1959. It is unfortunate that Mrs. McCune did not promptly apply for credit for her school service at the time the notice of the prospective legislation was sent to all districts. However, at the time she did so apply for said credit, the law did not allow the granting of it.

We are therefore of the opinion that it is not possible to permit Mrs. McCune to pay in for her service as a school clerk for the Board of Education from the period of January 17, 1949 through January 3, 1954, and receive credit for it in your Fund.

DISABILITY DEFINED

*(Retirement Board of the Policemen's Annuity and Benefit Fund—
G. F. M.—March 2, 1965)*

In response to your request for an opinion concerning certain police officers now receiving disability benefits, the following is submitted:

Your letter states that your Fund has many police officers on its ordinary and duty disability pension rolls, all of whom are not capable of performing unlimited police duties in the strictest sense of those words, but many of whom may be capable of performing certain line and staff duties in the Police Department. Your letter further states that the Retirement Board would like to return many of these police officers to the service to a position in which they could perform police duty. You also request an opinion on the definition of "disability" insofar as it applies to policemen.

Section 5-115 of the Act governing your Fund (Ill. Rev. Stats. 1963, Chap. 108½, Sec. 5-115) provides as follows:

"Sec. 5-115. **DISABILITY.** A condition of physical or mental incapability to perform any assigned duty or duties in the police service".

The ability of a man to perform police service is, of course, to be determined by the physician or physicians appointed by the Retirement Board for the purpose of examining the man to determine his physical and mental condition.

It is to be noted from the above definition of disability that while a policeman might be disabled from performing such duties as a traffic officer or as a patrolman answering emergency calls of all types, such patrolman's physical condition might be such that he would be able to perform other services in the Police Department, which may not require the physical activity or dexterity that would be required of a man assigned to more active duties. A man who might not be able to actively engage in the strenuous activities required of an unlimited service policeman, might well be able to serve in the Bureau of Records, the Bureau of Identification or perform some of the services which are now performed in and for the Police Department by civilians, and thus would be able to earn his full salary as a Policeman.

There very well could be great psychological value if such a policeman were to return to work in the Department, as it would give him a feeling of being needed, restore his self-esteem, and in many cases effectuate a more rapid curing of any disability from which he may suffer.

Section 5-154 and 155 of the Act governing your Fund provide for the granting of duty and ordinary disability respectively, and both sections start out with practically identical words, providing for a grant of benefits for policemen who become disabled. Section 5-154 (Ill. Rev. Stats. 1963, Chap. 108½, Sec. 5-154) starts:

"An active policeman less than age 57 who becomes disabled * * *"
and Section 5-155 (Ill. Rev. Stats. 1963, Chap. 108½, Sec. 5-155) starts:

"Sec. 5-155. A policeman less than 57 who becomes disabled * * *"

The sections then provide for the benefits to be paid in each case under either section, upon the man becoming "disabled". As stated earlier, a man becomes disabled only when he is unable to perform the duties assigned to him.

If, as stated above, a policeman is able to perform any duties in the Department at all and is then assigned to those duties that he may be able to perform, he would not be considered disabled under the provisions of your Act and his disability benefits should be terminated. He should be returned to the service if he can perform the duties to which he will be assigned.

We are, therefore, of the opinion that while a man's physical condition might be such he would be prevented from performing some duties in the Department, if he is able to perform any duties in the Department and is assigned to such duties, he is not disabled, and therefore is not entitled to receive disability benefits under the provisions of the Act governing your Fund.

PENSION FUND RIGHTS OF WATER FILTRATION PLANT GUARDS

(Acting City Comptroller—M. J. H.—July 22, 1965)

You state in your letter of July 15, 1965:

"The Police Department will detail five light duty policemen to the Water Filtration Plants as guards. For the remainder of 1965, they will be paid on Police Department Rolls but will be charged to outside services' account in the water Fund.

"In 1966, to avoid duplicating the charge in the budget, it is recommended that Water Fund budget for them as part of Water Department Payroll. The men can be detailed to this assignment by Police Department and still remain under the general supervision of the Police Department. However, they will be included in the Water Fund payroll time sheets and will be charged directly to Water Fund. The only question arising is that of pensions. Can these men be retained in Police Pension Fund although they are paid from fund No. 200, Meter Fund. The Police A & B Fund (Mr. Jones) say there is a legal point involved so I am submitting the question to you for decision."

The undersigned has discussed this matter with both Mr. Loser and Mr. Jones.

The proposed arrangement described in your letter is amply covered by Section 5-174 of the Illinois Pension Code (Ill. Rev. Stat. 1963, chap. 108½, par. 5-174) which provides:

Section 5-174 of the Illinois Pension Code (Ill. Rev. Stat. 1963, chap. 108½, par. 5-174) provides:

"Whenever a policeman is assigned to a position in the police department other than the position he holds by certification and appoint-

ment as a result of a competitive civil service examination, there shall be deducted from his salary the amount which would have been deducted had he continued in the position he held by such certification and appointment. If such deductions are not made, the policemen may pay such amount direct to the fund and shall be credited with the corresponding city contributions, to the end that he may retain all rights he otherwise would have had were his employment continuous in his civil service position; provided, that any such amount not so deducted from his salary nor paid by him shall be deducted from the earliest possible and practicable payment of salary due and payable to him or on his account. The policeman shall receive credit for such employment as services for all purposes of this article.

Definitions

Section 5-109 of Chap. 108½

"Policeman":

"(a) An employee in the regularly constituted police department of a city appointed and sworn or designated by law as a peace officer with the title of policeman, policewoman, police patrol driver, police operator, chief surgeon, police surgeon, drillmaster, identification officer, secretary of the police department, police dog catcher, police kennelman, police matron, and member of the Police force of the police department;"

° If the policemen assigned to guard the Water Filtration plant are regarded as holding the position to which he was certified and appointed under Civil Service, there is no problem.

However, if the assignment and source of salary are considered to change the position of these policemen to a position in the police department other than that which they hold under civil service, the same deductions may be made from their salaries as contributions to the Pension Fund as would be made if they were working in the position to which they were certified under Civil Service. The City is also required to credit the accounts of these policemen in the Pension Fund with the corresponding city contributions.

Because these policemen will be performing a service for the Water Filtration Plant which the Water Department would otherwise have to employ other guards to perform, no question is raised as to the propriety of placing the assigned policemen on the Water Fund payroll.

The pension rights in the Police Pension Fund of the policemen assigned as guards to the Water Filtration Plant will be fully protected.

We are sending a copy of this letter to Richard J. Jones, Executive Secretary of the Policemen's Annuity and Benefit Fund.

WAIVING REFUND

*(Retirement Board of the Policemen's Annuity and Benefit Fund
—T. A. M.—January 5, 1966)*

In response to your request for an opinion concerning Mr. Roman Orzechowski, the following is submitted.

Your letter states that Mr. Roman Orzechowski was granted an annuity of \$162.50 per month on August 9, 1952. On October 28, 1964, Mr. Orzechowski filed an affidavit with your office requesting that the amount of his annuity be reduced to \$161.00 a month. This request was granted by the Retirement

Board of the Policemen's Annuity and Benefit Fund on November 17, 1964, dating from December 1, 1964.

Your letter further states that on November 22, 1965, Mr. Orzechowski made a second request that his annuity be reduced to \$153.50, the reason for the request being that he could then qualify for a Veteran's pension in the amount of \$48.00 per month. He explained that by continuing his pension in the amount of \$161.00 per month, his income would exceed \$3,000.00, making him ineligible for the government pension.

Your question is as to whether or not this annuitant can exercise his right under Section 5-121, Paragraph 2 of the Police Pension Act.

Chapter 108½, Section 5-121, provides :

"Prior service annuity, age and service annuity, widow's annuity and widow's prior service annuity shall consist of equal monthly payments for life with the first payment payable one month after the occurrence of the event upon which payment shall depend."

Paragraph 2 of Section 5-121 provides :

"Any annuitant may execute a written waiver under oath of his right to receive any part of his annuity, to take effect upon its being filed with the board. The amount waived shall be a permanent reduction in the annuity payable to the annuitant."

From the language of the statute, it is apparent that there is no limitation on the number of times that an annuitant may exercise a written waiver under oath of his right to receive any part of his annuity.

We are, therefore, of the opinion that Mr. Roman Orzechowski's request to reduce his annuity a second time should be permitted.

Section D. LABORER'S AND RETIREMENT BOARD EMPLOYEE'S ANNUITY AND BENEFIT FUND

PAYMENTS OF BENEFITS AFTER DISMISSAL

(Retirement Board of Laborer's Retirement Board Employees Annuity and Benefit Fund—G. F. M.—January 12, 1961)

In response to your request for an opinion concerning Pasquale R. Calcagno, William Guiliano, and Angelo S. Palermo, the following is submitted :

Your letter states that the three men named above were discharged by the Civil Service Board for accepting payments for over-times services; that all three of these men have applied for refunds of the accumulations standing to their credit in your Fund; and that you have requested an opinion as to whether or not such moneys may be paid to the applicants.

No moneys may be paid to William Guiliano as he has filed an appeal from the decision of the Civil Service Board and until such time as the appeal is decided, no action may be taken by your Fund in connection with any money allegedly payable as a refund to him.

Mr. Calcagno and Mr. Palermo have not joined in any appeal and at the present time are completely separated from the City's service. The time for their taking an appeal from the decision of the Civil Service Board has expired, and therefore their separation from the service has become final.

This assistant has been informed that these men tried to make restitution of the money illegally received by them, but such restitution was not permitted to be made, inasmuch as the City was covered by insurance. There has not been and I have been informed there will be no criminal charges filed against these men. As Calcagno and Palermo did not appeal from the decision of the Civil Service Board, both Calcagno and Palermo are entitled to receive the refund for which they have applied.

We are therefore of the opinion that there is nothing in the Act governing your fund to prevent your fund from paying the refunds requested by Pasquale R. Calcagno and Angelo S. Palermo.

DUTY DISABILITY

(Laborer's and Retirement Board Employees' Annuity and Benefit Fund—G. F. M.—January 31, 1961)

In response to your request for an opinion concerning certain employees of your Fund, who have not taken the examination required by the Act governing your Fund to be eligible to receive ordinary disability the following is submitted.

Your letter states that there are certain members of your Fund who for various reasons have never been examined by the doctor for the Fund to determine their eligibility for participation in the ordinary disability fund. Your letter further states that notices have been sent to all those people who participate in your Fund concerning whom you have any information but that a great many of the people to whom such letters have been sent have failed to appear at the doctor's and have always denied that they have received the notices to appear.

Your letter further states that there are other employees who do not fill out information sheets in your Fund until such time as they have found themselves disabled and who have always stated that "they didn't know that there was a pension fund" and that as a result they did not fill out such sheets.

Your Act in Section 47 (Ill. Rev. Stats. Chap. 24, Sec. 1154) provides in part thereof as follows:

"No future entrants or present employee shall have any right to * * * receive any ordinary disability benefits until he shall have been examined by at least one licensed and practicing physician appointed by the Retirement Board and shall be found to be in good physical condition".

As against the requirements of this section it is necessary that the employee of this Fund be informed of this requirement.

If the Retirement Board of the Laborers' and Retirement Board Employees Annuity and Benefit Fund does not inform the individuals whose names have appeared on the payrolls of the City of Chicago and from whose salary's deductions have been made and paid into your Fund that they must file information sheets to be examined for their condition of health it therefore becomes the fault of the Retirement Board that these people have not taken the examination.

It is incumbent upon your Fund to require that all its members take the examination by notifying them that it will be necessary that they take such examination.

It therefore follows that if the employee has not taken the examination it is not primarily his fault. Payments made by the man have been received

into the Fund and kept for his benefits even if information sheets have not been filed by him. A search of the card system of your Fund will disclose there are many employees who have not filed information sheets. If it were possible that the cards showing the credit of these employees could be checked against the payrolls in your office, it would indicate whether or not information sheets had been filed by those on the payrolls and, perhaps, through channels these employees could be informed of the necessity of filing information sheets and at that time be told to take the ordinary disability examination, which is without charge to them.

Because the burden of seeing that the examination of your members is made falls upon the Fund, we are therefore of the opinion that where an examination has not been made, the person is entitled to receive ordinary disability benefits upon his becoming disabled unless it is clear from his illness that he would not have passed a medical examination at the time of his entrance into the service.

CONTRIBUTION FOR PORT SERVICES

(Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M.—April 25, 1961)

In response to your request for an opinion concerning Alex Gaglia, Andrew F. Kowalski, and Nofrio Tortoriello, the following is submitted.

You have requested an opinion concerning the above named men for the reason that they are entitled to receive an annuity of \$25.00 per month each, and Alex Gaglia being entitled to receive an annuity of \$52.94 per month.

You have requested an opinion as to why these men are to receive refunds. All these men are entitled to receive refunds by reason of the excess costs of annuity and deductions.

Section 37 of the Act governing your Fund (Ill. Rev. Stats. 1959, Chap. 24, Sec. 1144) provides in part thereof as follows:

"If at the time the amount of annuity for any employee shall be fixed in accordance with the foregoing provisions of this Act, there shall be to the credit of such employee, for the purpose of providing such annuity, an amount equal to or in excess of that necessary to provide such annuity, all deductions of salary, payments or otherwise made by such employee for annuity purposes, for services rendered from and after the date on which the accumulated sums to the credit of such employee for annuity purposes was first had provided such employee with such amount of annuity as of his age at such date shall with interest at the effective rate, be refunded to such employee when he shall enter upon an annuity ; * * *

"Provided, that if such annuity so fixed shall not become payable, but in lieu thereof a larger amount becomes payable by virtue of subsequent sections of this Act the amount so refunded shall be reduced by 5/12ths of the value of the difference of the amount of annuity payable and the amount therefor fixed as the value of such difference may be at that date and as of the age of such employee when such annuity is granted ; * * *

All of these men came into the Fund at an advanced age. As long as they are in the service deductions are required to be made from their salary even though their annuity is fixed at age 65.

Alex Gaglia is 72 years at the present time. While he has earned a larger annuity than the other two men, there still is, in the fund, accumulated salary

deductions for annuity purposes in excess of the costs of his annuity, as provided in the Act, which together with any deductions in error which may have been made, bring the total amount due him to \$1,621.29.

Andrew F. Kowalski is 76 years of age and paid in amounts, which accumulated were in excess of the cost of his annuity which together with possible deductions in error, equal the sum of \$2,705.54 which should be refunded to him.

Nofrio Tortoriello is also 76 years of age. He paid in amounts which accumulated were in excess of the cost of his annuity and that amount together with any errors in deductions amounts to \$2,845.58, which sum should be refunded to him.

These amounts deducted for annuity purposes and accumulated with interest in excess of the cost of the annuity should be returned to these men as is provided by Section 27 above quoted.

These annuities are based on the years of service indicated up to the dates their annuities became fixed. Their services rendered subsequent to such dates, up to their retirements did not permit them to receive the benefits of the fifteen or twenty year minimum annuities as provided in Section 57½ of the Act governing this Fund.

We are therefore of the opinion that Alex Gaglia, Andrew F. Kowalski and Nofrio Tortoriello are entitled to receive the refunds set out above, together with the annuity fixed for them at the time of their separation from the service.

CONVICTION OF A MISDEMEANOR

(Retirement Board of the Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M.—September 7, 1961)

In response to your request for an opinion concerning Peter Auriemma, the following is submitted.

Peter Auriemma, a laborer in the Water Department of the City of Chicago, was indicted for larceny of gasoline. Upon trial he was found guilty on June 28, 1961 of having stolen 72¢ worth of gasoline from the City of Chicago.

Section 1.1 of your Act (Ill. Rev. Stats. 1959, Chap. 24, Section 1108a) provides in part thereof as follows:

"Notwithstanding any other provision of this Act, none of the benefits herein provided for shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his service as an employee."

"This Section shall not operate to impair any contract or vested right heretofore acquired under this Act nor to preclude the right to a refund * * *."

As Mr. Auriemma was found guilty of only a misdemeanor his rights to receive a pension from your Fund have not been impaired in any manner.

We, are, therefore, of the opinion that Mr. Auriemma is entitled to receive a pension from your Fund, rather than a refund, upon his making application for such, despite the fact that he was indicted for larceny of gasoline.

DISABILITY WHEN NOT IN PERFORMANCE OF SERVICES

(Retirement Board of the Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M.—November 9, 1961)

In response to your request for an opinion concerning one John J. O'Connor, the following is submitted.

Your letter says that John J. O'Connor became a member of your Fund on August 18, 1955; that on January 31, 1961, he filed an application for duty disability benefits alleging that he was injured as a result of the performance of an Act of duty on October 17, 1960; that an accident report shows that Mr. O'Connor was allegedly working on top of a pipe trench and became involved in an argument with another laborer; the other laborer accidentally pushed Mr. O'Connor causing him to lose his balance and fall into the pipe trench; you wish to know whether or not your Fund is liable for the results of any injuries resulting to John J. O'Connor by reason of his falling into the trench.

The Act governing your Fund in Section 46 (Ill. Rev. Stats. 1959, Chap. 24, Section 1153) provides in part thereof as follows:

"Any contributor less than sixty five (65) years of age, who shall become disabled on or after the day on which this Act shall come in force and effect in such city, as a result of injuries incurred—on or after such day—in the performance of any Act or Acts of duty shall have a right * * *".

The accident report giving the cause of the accident states that Mr. O'Connor was pushed during an argument with another laborer and as a result thereof, fell into the pipe trench about which the employees were working. While it is true that if Mr. O'Connor was not present at work, he would not have fallen into the pipe trench, certainly it was not the result of the performance of an act or acts of duty that occasioned his so falling.

We are, therefore, of the opinion that Mr. O'Connor is not entitled to receive duty disability benefits for any injury which resulted from his falling into the pipe trench as a result of an argument with another laborer.

SALARY AS BASIS FOR ANNUITY

(Retirement Board of the Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M.—March 13, 1962)

In response to your request for an opinion concerning Eugene Manno, the following is submitted.

Your letter states and your records show that Eugene Manno was granted duty disability benefits for the period from February 1, 1961 to his return to work on March 16, 1961; that this employee questions the amount of disability rate and claims that the rate should have been based on the salary of \$29.40 per day which he was receiving; the salary deduction sheets indicate that this man was receiving a salary of \$24.20 per day plus overtime in the amount of \$5.20 at this time; that his Civil Service Record shows that he was blanketed as a Civil Service Asphalt Helper on July 1, 1949; that a leave of absence was given on April 7, 1960 to become a temporary appointee as cut out foreman; that he was laid off as a temporary appointee cut out foreman

on December 16, 1960, reinstated on December 16, 1960 as a Civil Service Asphalt Helper and given a leave of absence on April 26, 1961 to be appointed a temporary foreman. It was on February 1, 1961 that he was injured.

Section 46 of the Act governing your Fund (Ill. Rev. Stats. 1961, Chap. 24, Section 1153) provides in part thereof as follows:

"Any contributor less than sixty five (65) years of age, who shall become disabled on or after the day on which this Act shall come in force and effect in such city as the result of injury incurred—on or after such day—in the performance of any act or acts of duty, shall have a right to receive duty disability benefits, during any period of such disability for which such contributor shall not have received nor have a right to receive salary, of an amount equal to 75% of his salary as it shall be at the time of such injury * * *."

Section 12 of the Act governing your Fund (Ill. Rev. Stats. 1961, Chap. 24, Section 119) provides in part thereof as follows:

"The following words and terms as used in this Act shall mean as follows, respectively:

'Salary: Annual Salary: provided, that in cases where the salary is appropriated or fixed or arranged on an annual basis upon the actual sum which would be payable to an employee during the year if he worked the full regular working time in the position in the service held by him in the rate of computation exclusive of overtime appropriated or fixed as salary or wages for service in such position held by him shall be considered the annual salary and the maximum annual salary of such contributor for such year * * *."

It may readily be seen from the above quoted sections of the Act governing your Fund that the salary paid Mr. Manno at the rate of \$24.20 a day should be used as the basis of which duty disability benefits and not his salary plus the overtime.

We are, therefore, of the opinion that the amount of duty disability benefits granted to Mr. Eugene Manno for the period from February 1, 1961 to his return to work on March 16, 1961 was in the proper amount.

REINSTATEMENT FOR DUTY DISABILITY PAYMENTS

(Retirement Board of the Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M.—May 29, 1962)

In response to your request for an opinion as to whether or not benefits are now payable to Arthur Tucker, the following is submitted.

Arthur Tucker, an employee of the Labor Department of the City of Chicago, while cleaning the streets in the course of his employment, was, on the 2nd day of October, 1955, struck and seriously injured by an automobile driven by a Willie Anderson, at or near the intersection of 43rd Street and South Park. As a result of this accident, Arthur Tucker lost his right leg.

On December 20, 1955, the Retirement Board of the Laborers' and Retirement Board Employees' Annuity and Benefit Fund of Chicago granted duty disability benefits to Arthur Tucker at the rate of \$8.07 per day less any Workmen's Compensation benefits that were payable.

Arthur Tucker filed a claim against the Industrial Commission (Workmen's Compensation) and on September 17, 1967, the Industrial Commission

gave him an award in the total sum of \$13,206.00 payable at the rate of \$34.00 per week.

In 1956, Arthur Tucker filed a common law action against Willie Anderson and others. The City of Chicago filed its intervening Petition in this suit against Willie Anderson and others in order to recover the Workmen's Compensation it had already paid and such future sums as it might be required to pay, together with the money it had paid out for medical expenses for Arthur Tucker. The total amount sued for by the City was \$14,046.25.

The suit against Willie Anderson and others was settled and the City of Chicago, through its Workmen's Compensation Bureau stopped making any payments to Arthur Tucker under the provisions of the law which requires that they be reimbursed from this kind of law suit for monies expended through Workmen's Compensation. The law says, in effect, that if a man recovers in a law suit from a person causing an injury which is the same injury for which he is receiving Workmen's Compensation, the City of Chicago has a right to intervene in the law suit and recover the amount of Workmen's Compensation that they had paid to the injured person.

Arthur Tucker through his attorney settled with the City of Chicago, and received the sum of \$1,250.00 in full of monies paid by the City of Chicago to Arthur Tucker for Workmen's Compensation, and no further Workmen's Compensation became payable. No duty disability benefits have been paid to Arthur Tucker since July 31, 1959.

A letter was received by the office of the Fund informing them of the award made by the Workmen's Compensation from the Attorney in the case, Leonard Ring. In about August, 1959, Arthur Tucker came up for an extension of duty disability benefits and he informed the office that his award had been terminated by reason of a settlement with the City of Chicago in an amount allegedly due for payments made by Workmen's Compensation.

Duty disability benefits were stopped in July, 1959, because there arose a question as to whether or not deductions should be continued to be made because of the fact that Tucker had received the damages in this law suit in lieu of Workmen's Compensation. The matter was deferred from time to time and duty disability benefits were not again ordered paid.

No duty disability benefits have been paid since July 31, 1959, to the present time. Mr. Tucker is still disabled as he will never be able to come back to work having suffered the loss of one leg and 50% loss of use in the other.

Section 48 of the Act governing your Fund (Ill. Rev. Stats. 1961, Chap. 24, Sec. 1155) provides in part thereof as follows:

"If any contributor who shall be disabled, or the widow of any contributor who shall die, shall receive any compensation from such city on account of such disability or death under and by virtue of the law known as the 'Workmen's Compensation', and the disability, or injury, or loss which forms the basis of any compensation, award, pension or payment for a specific loss, is also a condition which renders such contributor incapable of performing the duties of his position in the service, the disability benefit herein provided for such contributor shall be reduced by any sum so received if such sum shall be less than the amount of such benefit; and in any case in which the sum received as compensation exceeds the amount of the disability benefit herein provided for such contributor, such contributor shall not receive any such disability benefit until a period of time during which the disability benefit payable at the rate herein stated would equal the sum received as compensation shall have expired."

It is to be noted that in the section of the law set out above, that the "disability benefit herein provided for such contributor shall be reduced by any sum so received."

Arthur Tucker stopped receiving Workmen's Compensation in July of 1958, and received no further benefits of any kind, despite his large award from Workmen's Compensation, since that date.

It therefore follows that Arthur Tucker was entitled to receive full duty disability benefits beginning as of July 29, 1958, in the full amount granted to him of \$8.07 per day as he has not recovered from the loss of his leg, nor is he receiving, nor has he received, any Workmen's Compensation since that date.

We are, therefore, of the opinion that Arthur Tucker should be reinstated on the duty disability roll and his account should be adjusted so that he receives payments of full duty disability benefits from July 29, 1958 to the present time, and such duty disability benefits should be continued until he attains age 65.

PAYMENT TO HEIRS

(Retirement Board of the Laborers' and Retirement Board Employees' Annuity and Benefit Fund of Chicago—G. F. M.—June 12, 1962)

In response to your request for an opinion as to whom a refund is payable by reason of the death of Mrs. Emma Neff, the following is submitted.

Your letter states and your records show that Mrs. Emma Neff was granted an annuity of \$25.00 per month for a period of five years and two months to begin as of May 3, 1962, first payment to be made as of April 3, 1962, together with an adjustment refund of \$2,368.53 on account of the excess cost of annuity and errors in deductions. On April 24, 1962, Mrs. Emma Neff died. You have requested an opinion as to whom the adjustment refund in the amount of \$2,368.53 together with the cost of annuity in the amount of \$1,359.74 should be paid.

Inasmuch as Mrs. Neff was entitled to receive, prior to her death, the sum of \$25.00 together with an adjustment refund of \$2,368.53 because of the excess cost of annuity and errors in deductions, it is our opinion that this money should be paid to her heirs as she definitely was entitled to receive it prior to her death.

Because Mrs. Neff died after being entitled to receive only the sum of \$25.00 in the form of annuity the accumulation standing to the credit of her husband in the amount of \$1,359.74 becomes payable under the provision of Section 39 of the Act governing your Fund.

Section 39 of the Act governing your Fund was amended in the year 1961 to provide, in part thereof, as follows (Ill. Rev. Stats. 1961, Chap. 24, Sec. 1146 (e)) :

"In any case in which an amount equal to the total amount accumulated to the account of a deceased contributor for annuity purposes shall not have been paid to such contributor and in the case of a married male contributor to such contributor and the widow of such contributor both together, in the form of annuity before the death of the last of such persons who shall die, an amount equal to the difference between the sum of such amounts, and the entire amount paid in the form of annuity or annuities, refund without interest or either such amount shall be refunded and paid * * * to the heirs of such contributor in the proportion provided and as heirship is determined under the laws of descent of the State of Illinois pertaining to persons who die intestate but assuming for the purpose of such payment of refund and determination of heirs, that a deceased male contributor left no widow of him surviving in those cases where a widow eligible for widow's annuity as his widow, surviving him and subsequently died * * *".

The above provision of your law, in simple language, provides that the refund of unused annuity accumulations shall be paid to the heirs of the contributor to your Fund, Mr. Neff, the husband of Emma Neff.

We are, therefore, of the opinion that the sum of \$25.00 representing the annuity payable together with the adjustment refund of \$2,368.53 should be paid to the heirs of Mrs. Emma Neff in accordance with the laws of descent of the State of Illinois, and that the refund of unused annuity accumulations in the amount of \$1,359.74 should be paid to the heirs of Mr. Neff, the deceased contributor, in accordance with the laws of descent of the State of Illinois.

WORKING UNDER AN ALIAS

(Retirement Board of the Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M.—July 12, 1962)

In response to your request for an opinion concerning one Thomas Gleason who worked under the name of Carl Berlin, the following is submitted.

Your records disclose that Thomas Gleason worked under the name of Carl Berlin from 1928 to July, 1950; and that in 1950 he was certified under the name Thomas Gleason. You have requested an opinion as to whether or not he may secure a refund of the moneys he paid in under the name of Berlin and also whether or not he may receive credit for the period of service he rendered under that name upon his paying for it.

Inasmuch as Thomas Gleason was not entitled to hold down a position formerly occupied by Carl Berlin, any monies paid by him into the Fund must necessarily be treated as errors in deduction and are refundable to him.

A peculiar thing arises from checking your records, and that is deductions were made from Thomas Gleason beginning July 15, 1950 and deductions were also made from Carl Berlin for the period of July 15, 1950 to and including November 15, 1950, so it would appear as though there is some question as to whether or not Thomas Gleason was able to occupy two positions in the service and receive two pay checks for that period of time.

In the event any refund is granted as a result of this opinion, an investigation should be made as to who the person was occupying Carl Berlin's job for the period from July 15, 1950 to and including November 15, 1950, so that any refund that is payable is paid to the person entitled to receive it.

Mr. Gleason is not entitled to pay into the fund for the period of time he occupied a position under the name of Carl Berlin, as he did not fall within the definition of a member of the fund during that period.

Section 12 of the Act governing your Fund (Ill. Rev. Stats. 1961, Chap. 24, Sec. 1119) provides in part thereof as follows:

"Contributory; Contributor to this Fund, or employee: Any person who was, is or shall be employed by such city or the Board of Education of such city in a position classified by the Civil Service Commission of such city as in the labor service thereof, and who has been or shall be appointed to such position under and by virtue of 'An Act to regulate the Civil Service of Cities Approved March 20, 1895, as subsequently amended;'"

We are, therefore, of the opinion that Mr. Gleason is entitled to receive a refund of the contributions made by him while he worked under the name of Carl Berlin, but as a refund in errors in deduction.

We are also of the opinion that Mr. Gleason is not entitled to receive credit in your fund for the period of time that he worked under the name of Carl Berlin as he was not an employee of your Fund and had no right to hold the job which he occupied.

PAYMENT TO CHILDREN THROUGH GUARDIAN

(Retirement Board of the Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M.—September 11, 1962)

In response to your request for an opinion concerning the payment of a refund by reason of the death of Edward J. Falat, the following is submitted.

Your records show that Edward J. Falat died June 18, 1962; that there is payable, by reason of his death, a refund in the amount of \$846.98 to his two children, Donald Falat and Susan Falat; that Susan Falat is a minor; that you have requested an opinion as to what should be done with that portion of the refund payable to Susan Falat; that it further appears from your records that Edward J. Falat and his wife, Eugenia, the mother of these two children, were divorced; and that custody of the then minor children was given to Eugenia Falat, with whom Susan has lived ever since.

Section 59 of the Act governing your Fund (Ill. Rev. Stats. 1961, Chap. 24, Sec. 1166) provides in part thereof as follows:

"In all cases in which any money is payable to a minor or to a person adjudged insane or mentally incompetent, the Retirement Board may, in its discretion and when to the best interest of such minor, or insane or mentally incompetent person waive guardianship or conservatorship proceedings and pay such money to the person providing for or caring for such minor and to the wife, children, or blood relative providing for or caring for such insane or mentally incompetent person."

We are, therefore, of the opinion that under the provisions of the above section of the Act governing your Fund that the guardianship proceedings may be waived and that portion of the refund payable to Susan Falat may be paid to her mother, Eugenia Falat, as mother and natural guardian, as she is the person providing and caring for such minor.

DISABILITY BENEFITS

(Retirement Board of the Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M.—December 3, 1962)

In response to your request for an opinion concerning the rights of Mildred Jarzabek Mandel, the following is submitted.

Mildred J. Mandel applied for and received a leave of absence on the 1st day of August, 1961, based on the allegation that she was taking her husband to California for his health; while on the way to California, she became ill, apparently from acute respiratorial obstruction; that she was examined in San Francisco where the doctor diagnosed a thyroid tumor; that this was later verified on January 4, 1962, when she had a sub-total thyroidectomy; that your doctor's report indicates that the scar was very tender and that she is extremely nervous and weak due to her surgery. She had had difficulty in

breathing prior to this illness. You requested an opinion as to whether or not she was entitled to ordinary disability benefits because she was on a leave of absence at the time she became ill.

Section 47 of the Act governing your Fund provides in part thereof as follows:

"Any contributor less than 65 years of age who shall become disabled on or after the day on which this Act shall come into force and effect in such City as a result of any cause other than injury incurred in the performance of an Act or Acts of duty * * * shall have a right to receive ordinary disability benefits during any period or periods of such disability after the first thirty (30) days of any such period and shall not exceed in the aggregate throughout the entire period of such contributors service a period of time equal to one-fourth ($\frac{1}{4}$) of the entire period of service rendered by such contributor in the service prior to the time he shall have become so disabled * * * and providing further that no contributor shall have any right to receive ordinary disability benefit on account of any disability which shall commence during any period of absence from duty whether such absence be caused by lay off, leave of absence or suspension of employment for a definite or indefinite period of time, or any other reason, unless the Retirement Board, upon sufficient evidence presented to it shall find that the disability resulted from a cause which existed or occurred prior to such lay off, leave of absence, or suspension of employment."

From the evidence contained in the Doctor's report and from the Doctor's oral testimony given at the time of the consideration of this matter by the Retirement Board, it appears that the Acute Respiratory Obstruction was caused by a calcification in the sub-sternal thyroid causing pressure on the trachea. The evidence further shows that this calcification in the sub-sternal thyroid is the result of a long, slow process. It therefore follows that the disability from which Mildred J. Mandel suffered after securing a leave of absence "resulted from a cause which existed or occurred prior to such * * * leave of absence * * *."

We are, therefore, of the opinion that Mrs. Mildred J. Mandel is entitled to receive ordinary disability benefits as her disability had its cause or beginning prior to her securing a leave of absence.

PAYMENT TO ATTORNEY

(Retirement Board of the Laborers' and Retirement Board Employees' Annuity and Benefit Fund—G. F. M.—April 10, 1963)

In response to your request for an opinion as to whether or not the refund payable by reason of the death of Donato Antenucci may be paid to Horatio Tocco, as Attorney in fact for Antonio Antenucci, son of the deceased Donato Antenucci, the following is submitted.

Your records show that Donato Antenucci was born April 12, 1888; that he entered the service of the City of Chicago on October 24, 1930; that he became separated from the service of the City of Chicago on February 16, 1960; and that he died on July 24, 1960; and that there is due and payable by reason of the death of Donato Antenucci, a refund in the sum of \$4,805.01. Your records also disclose the fact that at the time of the death of Donato Antenucci he left his surviving one son, Antonio, his wife Assunta Aquilano Antenucci having died February 25, 1936.

At the present time Antonio Antenucci is still living in Italy, a resident of Celenza Sul Trigno, Province of Chieti, Italy. Antonio Antenucci has ap-

pointed Horatio Tocco his Attorney in fact for the purpose of collecting the refund payable by reason of the death of his father.

Horatio Tocco is Attorney for the Italian Consulate General in Chicago. As Attorney in fact, Horatio Tocco has supplied your office with the following forms:

1. A table of heirship issued by the Registrar of Vital Statistics of the Municipality of Celenza Sul Trigno, Province of Chieti, to which is attached a sworn translation of the document from Italian to English.
2. Also supplied by the Attorney in fact has been death certificates together with sworn translations of the original documents.
3. The birth certificate of Antonio Antenucci, together with sworn translation of the birth certificate.
4. A printed copy of a Power of Attorney, in both Italian and English and bearing Italian fee stamps and the signature of the Prefettura Di Chieti, certifying to the correctness of the signature.
5. A certification by Richard T. Booth, Vice-Consul of the United States of America in Rome, Italy, certifying the signature of the official who signed the Power of Attorney.

While the Act governing your Fund provides (Ill. Rev. Stats. 1961, Chap. 24, Sec. 1166) as follows:

"All annuities, refunds, and disability benefits granted under the provisions of this Act in every portion of such annuities, refunds, benefits, shall be exempt from attachment or garnishment process and shall not be seized, taken, subject to, detained, or levied upon by virtue of any execution or any process of proceeding whatsoever issued out of or by any court, for the payment and satisfaction in whole or in part of any debt, damage, claim, demand or judgment, against any annuitant, refund applicant, or other beneficiary hereunder, and no such annuitant, refund applicant, or other beneficiary shall have any right to transfer or assign his or her annuity, refund or disability benefits or any part thereof either by way of mortgage or otherwise, other than such portion of any refund payable to such refund applicant, under the terms of this section * * *."

It is to be noted in the above quoted section of the Act that no provision is made against the payment of monies to a person who is given a Power of Attorney. In this case in particular the refund applicant lives in Italy and he has appointed his Country's representative in the City of Chicago to act for and on his behalf in the collection of this money.

We are of the opinion that the documents submitted by Horatio Tocco are sufficiently comprehensive and authentic to permit the payment to the said Horatio Tocco of the amount of refund due and payable by reason of the death of Donato Antenucci, as Attorney in fact for Antonio Antenucci.

COMPUTATION OF OVERTIME SALARIES

(Laborers' and Retirement Board, Employees' Annuity and Benefit Fund—G. F. M.—April 7, 1964)

In response to your request for an opinion as to determining the salary to be used for computation of annuities in certain cases, the following is submitted:

Your letter states that certain employees of the City of Chicago, members of your Fund, perform services for 46 hours a week, including 6 hours of work on Saturday, but are paid as though they had rendered services for 48

hours by being paid for 8 hours for Saturday; that these employees do not receive overtime payments as such, in that the amount of money paid to them for each of the 48 hours is the same; that the additional 6 hours that these employees work are generally worked on Saturday; and that your records indicate that their working hours may vary from Saturday to Saturday because these employees receive 8 hours pay for the 6 hours work that they do on Saturday. It must be considered that the additional 2 hours pay that they receive on that day is paid to them in lieu of overtime pay for the period of time that they worked on that day. Any other interpretation of this additional pay would lead to the conclusion that these men are being paid for a period of time when they do not earn the money.

The Act governing your Fund (Ill. Rev. Stats. Chap. 108½, Sec. 11-217) provides in part thereof as follows:

"For the purpose of this Article, annual salary of an employee whose salary or wages was appropriated, fixed or arranged in the annual appropriation ordinance upon other than an annual basis shall be determined as follows:

(b) Daily basis, hourly basis in 260 times such daily wage; 2080 such hourly wages; hereby established as the norm.

The norm is based on a 12 month per year five day work week of 8 hours per day and 40 hours per week, with consideration given only to time compensated for its straight time rate of compensation or wage. The norm shall be increased (subject to the maximum of 300 days or 2400 hours per year) or decreased as respects an employee according and to the extent that the normal and established work period at straight time compensation or wage for the position held by him in the class, grade or category in which he is assigned, is for a greater or lesser number of months, days or hours than the period on which the established norm is based.

Daily wage, and hourly wage, mean, respectively, a normal, regular and basic time of rate of compensation or wage appropriated and payable for a normal and regular days' work, or hours' work, in the employees' position in the service.

Any time worked in excess of the norm or decreased norm, whichever is applicable, and compensation, salary and wage attached to or paid for such time, which is compensated for at overtime, premium, or other than regular or basic straight time rates shall not be considered as time worked, or as salary or wage. Such time and compensation shall in every case and for all purposes be considered overtime, and shall be excluded for all purposes under this Section and Article. However, the straight time portion of compensation or wage for time worked on holidays which fall within an employee's established norm, shall be included for all purposes under this Section and Article.

For minimum annuity purposes under Section 11-134 where a salary rate change occurs during the year, it shall be considered that the annual wage for any year it is at such monthly, weekly, daily or hourly salary or wage rate as was applicable for the greater number of months, weeks, days or hours, respectively in each year under consideration."

As the above Section of the Act governing your Fund excludes all periods of work for which overtime or premium payments are made for all purposes of the Act, it necessarily follows that these employees' salaries or wages should be computed on the basis of their regular, normal working period of 40 hours a week.

The amount of hourly wage received by these employees under the provision of the Act governing your Fund is to be that amount of hourly salary or wage, at straight time rates, received by such employee for the greater number of hours for each year under consideration in determining his annual salary for the purposes of the Act.

We are, therefore, of the opinion that those employees who work 46 hours a week but receive therefor salary or wages based on 48 hours a week should have their annual salary or wages for purposes of your Fund based on the amount that they would earn at straight time rates during their normal 5-day working week of 8 hours per day or 40 hours a week. We are also of the opinion that where there is a salary rate change in the case of these employees during the year, that the salary or wage rate at straight time that was applicable for the greater number of hours during the year should be the one upon which their annual salary is computed.

Section E. HOUSE OF CORRECTION EMPLOYEE'S ANNUITY AND BENEFIT FUND

ASSIGNABILITY OF DEATH BENEFITS

(Board of Trustees of the House of Correction Employees' Pension Fund—G. F. M.—October 8, 1962)

In response to your request for an opinion concerning whether or not Mr. Gustave Kellberg may designate his brother, Frank A. Kellberg, as beneficiary of his refund, in the event of his death, the following is submitted.

Section 19 of the Act governing your Fund (Ill. Rev. Stats. 1961, Chap. 67, Sec. 19) provides in part thereof as follows:

"If an employee dies after having contributed to said fund his nearest heir or heirs according to the laws of descent in Illinois, may, upon application made after said employee's death, receive the total amount paid into said fund by said deceased employee, less the amount or amounts paid to him and/or his widow or children in the form of an annuity."

The Act governing the Municipal Employees' Annuity and Benefit Fund in its section pertaining to refunds (Ill. Rev. Stats. 1961, Chap. 24, Sec. 1082) provides in part thereof as follows:

(e) "if, * * * the sums deducted from the salary of such member employee or otherwise paid by him have not been paid to such member employee (they), shall be refunded and paid to a beneficiary theretofore designated by such employee by an instrument in writing signed by such employee before an officer authorized to administer oaths and filed with the Retirement Board before the death of such member employee".

The Act governing the Laborers' and Retirement Board Employees' Annuity and Benefit Fund provides in Section 39 of the Act governing their Fund (Ill. Rev. Stats. 1961, Chap. 24, Sec. 1146) in part thereof, as follows:

"(e) In any case in which an amount equal to the total amount accumulated to the account of a deceased contributor * * * shall not have been paid to such contributor * * * the entire amount shall be refunded and paid to beneficiary theretofore designated by such contributor by instrument in writing signed by such employee before an officer authorized to administer oaths and filed with the Retirement Board before the death of such employee * * *."

The Act governing the House of Correction Employees' Pension Fund was frozen by the legislature in the year 1957. It was not possible to add

to that Act the right to designate a beneficiary to receive his refund by a member of your Fund. However, in the sections of the Municipal Employees' Annuity and Benefit Fund and the Laborers' and Retirement Board Employees' Annuity and Benefit Fund Act quoted above the right is given to the employee to designate a beneficiary as is indicated in the portions of the Act hereinabove set out.

In arriving at the intention of the legislature in the control and administration of these funds many times it becomes necessary to consider other pension laws in order to arrive at the intention and purpose of the legislature. Because the legislation of these other pension funds is such as to permit employees, members of either of these two funds, to designate beneficiaries to receive any refunds which may become payable by reason of the death of the employee, it is our opinion that designation of a beneficiary by a member of your Fund may be made, by an instrument in writing, properly sworn to, filed with the Board of Trustees prior to his death or retirement, provided such beneficiary is an heir of the employee according to the laws of descent of the State of Illinois.

CHAPTER IV—RELATIONS OF CITY WITH OTHER GOVERNMENTS

Section A. FEDERAL RELATIONSHIP

F. H. A. PROCEDURE FOR REHABILITATION FINANCING

(Commissioner, Community Conservation Board of Chicago—
B. Q. O'B.—September 11, 1961)

This is to acknowledge receipt of your letter to this office requesting our opinion as to whether there are any state or local law restrictions that would apply to state-chartered lenders under the circumstances stated in your letter, as follows:

"The 1961 federal housing act includes amendments to sections 220 and 203 of the National Housing Act permitting FHA insured loans not to exceed \$10,000 per unit for rehabilitation purposes. These loans may be junior to existing loans, and in this regard a question arises concerning the ability of certain lenders to make such loans."

Section 220 of the National Housing Act (12 U. S. C. 1715k) as amended by the 1961 Federal Housing Act, provides in part as follows:

"(h) (1) To assist further in the conservation, improvement, repair and rehabilitation of property located in the area of an urban renewal project, as provided in paragraph (1) of subsection (d) of this section, the Commissioner is authorized upon such terms and conditions as he may prescribe to make commitments to insure and to insure *home improvement loans* (including advances during construction or improvement) made by financial institutions on and after the date of enactment of the Housing Act of 1961." (Italics supplied.)

Said section also provides:

"* * * a 'financial institution' means a lender approved by the Commissioner as eligible for insurance under Section 2, or a mortgagee approved under Section 203 (b) (1)."

Section 101, Title I, September 23, 1959, Pub. L. 86-372 (12 U. S. C. Sec. 1703) provides, in part, as follows:

"(a) The Commissioner is authorized and empowered, upon such terms and conditions as he may prescribe, to insure *banks, trust companies, personal finance companies, mortgage companies, building and loan associations, installment lending companies, and other such financial institutions*, which the Commissioner finds to be qualified by experience or facilities and approves as eligible for credit insurance, against losses which they may sustain as a result of loans and advances of credit, and purchases of obligations representing loans and advances of credit, made by them on and after July 1, 1939, and prior to October 1, 1961, for the purpose of financing alterations, repairs, and improvements upon or in connection with existing structures, and the building of new structures, upon urban, suburban or rural real property (including the restoration, rehabilitation, rebuilding, and replacement of such improvements which have been damaged or destroyed by earthquake, conflagration, tornado,

hurricane, cyclone, flood, or other catastrophe), by the owners thereof or by lessees of such real property under a lease expiring not less than six months after the maturity of the loan or advance of credit * * * *provided*, that with respect to any loan, advance or credit, or purchase made after the effective date of the Housing Act of 1954, the amount of any claim for loss on any such individual loan, advance of credit, or purchase paid by the Commissioner under the provisions of this section to a lending institution *shall not exceed 90 percentum of such loss* * * *)” (Italics supplied).

The “Financial Institutions Code”. Illinois, effective January 1, 1958 (Ill. Rev. Stats. 1959, Chap. 127, Secs. 63(b)20—63(b)37), in creating a Department of Financial Institutions and giving it jurisdiction for the orderly administration and enforcement of laws relating to financial institutions, defines them in 63(b)23, as follows :

“‘Financial institutions’ means state banks, ambulatory and community currency exchanges, cemetery associations, persons constituting cemetery care authorities, savings and loan associations, mutual building loan and homestead associations, savings associations, building and loan associations, trust companies, credit unions, guaranteed credit unions, persons engaged in the business of transmitting money to foreign countries or buying and selling foreign money, pawniers’ societies, title insuring or guaranteeing companies, and persons engaged in the business of making loans of five hundred dollars or less, all as respectively defined in the laws referred to in Sections 6 and 7 of this Act.”

State-chartered lenders or lenders controlled by state law, who might make loans for rehabilitation purposes under the National Housing Act as amended, include, in our opinion, state banks, state-chartered savings and loan associations, building, loan and homestead associations, insurance companies, and trust companies.

State banks, in our opinion, are not precluded by state law from lending money to be secured by junior mortgage provided that the loans are secured or covered by guaranty or insurance by the FHA. Section 32 of the Illinois Banking Act (Ill. Rev. Stats. 1959, Chap. 16½, Sec. 132) sets basic loan limits of total liabilities to any state bank of any person for money borrowed, and provides that the purchase of or loaning money in exchange for evidences of indebtedness which shall be secured by mortgage or trust deed upon productive real estate, which is a first lien upon the real estate, shall not be deemed to be considered as money borrowed within the meaning of this section. This, in our opinion, is not tantamount to providing that a loan by a state bank may not be secured by a junior mortgage. Section 33 of the Act sets marketable investment securities limits and Section 34 thereof declares exemption to loan investment limits (Chap. 16½, Secs. 133 and 134). Moreover, Section 35 of the Act (Chap. 16½, Sec. 135) provides, in part, as follows :

“The limitations in Sections 32, 33 and 34 upon the liabilities of any one person and upon the purchase and holding of marketable investment securities shall *not* apply to the following as to which there shall be *no limitation* :

* * * (2) *Loans to or obligations of any person to the extent that the same shall be secured or covered by guaranty or by commitment or agreement to take over or purchase, made by any Federal Reserve Bank or by the United States or any department, bureau, board, commission or establishment of the United States, including any corporation wholly owned, directly or indirectly by the United States; * * **” (Italics supplied).

The Illinois Savings and Loan Act (Ill. Rev. Stats. 1959, Chap. 32, Secs. 701 to 944) applies, as provided in Section 703 thereof, “to all existing *mutual*

building, loan and homestead associations, savings and loan associations, savings associations, building and loans associations, and other similar associations by whatever name called, organized under this or any prior Act; and to all foreign associations duly authorized to do business in this state."

Section 791 of Chap. 32 provides as follows:

"An association may loan funds to members as follows:

(a) On the security of withdrawable capital accounts, but no such loan shall exceed the withdrawal value of the pledged account;

(b) *On the security of real estate;*

(1) Of a value, determined in accordance with the section of this Act concerning Appraisals, sufficient to provide good and ample security for the loan; and

(2) With a fee simple title which is *unencumbered except as permitted in the section of this Article concerning Real Estate Encumbrances*; or

(3) A leasehold title of not less duration than 14 years beyond the maturity of the loan; and

(4) With the title established by such evidence of title as is consistent with sound lending practices in the locality; and

(5) With the security interest in such real estate evidenced by an appropriate written instrument and the loan evidenced by a note, bond or similar written instrument. For the purposes of this section a loan on the security of the whole of the beneficial interest in a land trust is a loan on the security of real estate if the title to the land is held by a corporate trustee and if the real estate held in the land trust meets the other requirements of this sub-section.

(c) For the purpose of *repair, improvement, rehabilitation or equipment of real estate*. However, any such loans which are not secured, guaranteed, or insured, as provided in this section, (1) shall be limited to \$3500 each, exclusive of legal and financing charges; (2) shall be repayable over a period of 5 years or less, in substantially equal installments not less frequent than semi-annual; and (3) shall not be made if the resulting aggregate unpaid balances of all of such loans would exceed 20% of the association's total assets;

(d) Through the purchase of loans which at the time of purchase the association could make in accordance with the provisions of this section and by-laws;

(e) Through the purchase of installment contracts for the sale of real estate, and title thereto which is subject to such contracts, but in each instance only if the association at the time of purchase could make a mortgage loan of the same amount and for the same length of time on the security of such real estate;

(f) *Through loans guaranteed or insured, wholly or in part by the United States or any of its instrumentalities, and without regard to the limits in amount and terms otherwise imposed by this Article;*

(g) On the security of any of the above authorized investments." (Italics supplied.)

Section 792 of Chap. 32 provides in part as follows:

"If the board of directors determines at any time that funds are available in excess of the demands and needs of members for loans, maturities, and withdrawals, an association may invest such funds as follows:

" * **

(g) With the approval of the Director, in the initial purchase and development, or the purchase or commitment to purchase after comple-

tion, of *home sites and housing* for sale or rental, including (without being limited to) projects for the reconstruction, *rehabilitation*, or rebuilding of residential properties to meet the minimum standards of health and occupancy prescribed by appropriate local authorities, and the provision of accommodations for retail stores, shops, and other community services which are reasonably incident to such housing projects; or in the shares of a corporation which owns one or more of such projects and which is wholly owned by one or more financial institutions whose investments are regulated by the laws of this State or of the United States. The association's *aggregate investment* under this sub-section shall *not exceed 10% of its total assets*, and no association shall make an investment of this type *unless it has reserves and undivided profits, or permanent reserve capital, totaling at least 5% of the aggregate withdrawal value of the association's withdrawable capital*. The Director shall approve the investment only if the association shows:

(1) That the association has adequate assets available for such an investment; and

(2) That the proposed investment does not exceed the reasonable normal value of the property or interest therein; and

(3) That there is a reasonable probability of such investment being profitable; and

(4) That unless the proposed project meets the requirements of paragraph (5) of this Subsection (g), the proposed project does not include the construction of dwellings designed for occupancy by four families or less; except that in the event the home sites or any portion of a project are not sold within a reasonable time after same have been made available for sale (such period of time to be determined upon application to the Director) such project or portion thereof may be further developed as hereinabove provided.

(5) That the proposed project is to be located in an area, including any contiguous area acquired incidental thereto, *determined by the Director to be an urban renewal, redevelopment, blighted, conservation area, or any other similar area provided for by the laws of the United States, the State of Illinois or local ordinances for slum clearance, conservation, blighted area redevelopment, urban renewal, or of a similar nature or purpose and in the event of such determination by the Director, the provisions of paragraph (4) of Subsection (g) shall not be applicable.*

(6) That all other requirements of this subsection have been met." (Italics supplied.)

Section 793 of Chap. 32 provides as follows:

"(a) Real estate is encumbered within the meaning of this article unless the security instrument establishes a *first lien* upon such real estate.

(b) Real estate is not encumbered within such meaning merely by reason of the existence of (1) instruments reserving rights-of-way, sewer rights, or rights in wells; or (2) building restrictions or other restrictive covenants; or (3) a lease under which rents or profits are reserved by the owners; or (4) current taxes or assessments not yet payable; or (5) other encumbrances which, in accordance with sound lending practices in the locality, are not regarded as constituting defects in real estate titles.

(c) *A loan may be made under this article on real estate which is subject to a prior lien or other encumbrance which is owned by or exists in favor of the association; or to a prior lien the full amount of which is deducted from the amount of the loan and retained by the association to pay such lien, or which is fully provided for in the closing of the loan transaction.*" (Italics supplied.)

In our opinion, an association of any of the types above mentioned in Section 703 of the Act may loan funds to members without regard to the limits

in amount and terms otherwise imposed by Article 5 of the Act, which is entitled "Investments" and includes all of the provisions of Sections 791 to 804, both inclusive, of Chap. 32, provided such loans are guaranteed or insured wholly or in part by the United States or any of its instrumentalities, as provided in Section 791 of Chap. 32.

In our opinion, the provisions of Section 793 that the real estate is encumbered within the meaning of this Article, unless the security instrument establishes a first lien upon such real estate with the exception that a loan may be made under this Article on real estate which is subject to a prior lien or other encumbrance which is owned by or exists in favor of the association; or to a prior lien the full amount of which is deducted from the amount of the loan and retained by the association to pay such lien, or which is fully provided for in the closing of the loan transaction, may be regarded as "limits in amount and terms otherwise imposed by this Article," compliance with which is specifically excused by Sub-section (f) of Section 791 as applicable to a loan guaranteed or insured wholly or in part by the FHA.

It is, therefore, our opinion that loans made by an association of any of the types mentioned in Section 703 of the Act, whether made to a member under Section 791 or whether made to non-members under Section 792 of the Act, may, in either case, be made without regard to the limits in amount and terms otherwise imposed by the Investment Article, Sections 791-804 of Chap. 32.

Section 794 of Chap. 32 provides in part as follows:

"The board of directors may specify the terms on which loans to members will be made, including (but not limited to) the following leading plans:

* * *

(d) Insured or Guaranteed Loans: Loans insured or guaranteed wholly or in part by the United States or any instrumentality thereof may be made and repaid in accordance with the applicable Federal law and regulations. * * *"

Section 802 of Chap. 32 provides in part as follows:

"(a) Every loan or other investment made in violation of this Act shall be due and payable according to its terms, and the obligation thereof shall not be impaired."

Under prior Acts of Illinois, junior mortgages given to building and loan associations as mortgagees have been held valid and not ultra vires. *Kelso v. Oak Park Building & Loan Association*, 99 Ill. App. 123, 126 (1900); *Kadish v. Garden City Loan & Building Association*, 151 Ill. 531, 535 (1894); Sundheim's Law of Building & Loan Associations, 3rd Ed., 1933, Sec. 121, p. 122. Building and loan associations have taken junior mortgages which have been foreclosed, the power to take such mortgages not being litigated. *Inter-State Building & Loan Association v. Ayers*, 177 Ill. 9, 21 (1898); *Borrowers' and Investors' Building Association v. Eklund*, 190 Ill. 257, 265 (1901); *Cornbelt Building & Loan Association v. Grabe*, 295 Ill. App. 135, 141 (1938).

Foreign corporations lending money in Illinois are governed by Section 212 of Chap. 32, which provides in part as follows:

"Any corporation formed under the laws of any other state or country, and authorized by its charter to invest and loan money, may, without qualifying to transact business in this state, *purchase or contract to purchase notes* or other evidences of indebtedness or interests therein, *secured by any security instrument, including mortgages or trust deeds* in the nature of mortgages conveying real or personal property in the State of Illinois. Notwithstanding the provisions of any other law of this state, any foreign corporation that may have heretofore or hereafter purchased notes or other evidences of indebtedness as aforesaid, *shall*

*have the same rights and powers for the recovery, servicing, protection and enforcement, by foreclosure or otherwise, of such notes or other evidences of indebtedness subject to the same penalties for usury, as private persons, citizens of this state. Such foreign corporation shall have power to acquire, hold, lease, mortgage, sell, contract with respect to, or otherwise protect or convey property in this state heretofore or hereafter assigned, transferred, mortgaged or conveyed to it as security for, or in whole or part satisfaction of, indebtedness purchased or owned by it. When a sale is made under any judgment, decree or power in a mortgage or deed, such foreign corporation may purchase, in its corporate name, the property offered for sale, and become vested with the title wherever a natural person might do so in like cases: * * * 'Corporation' as used in this act shall be deemed to include any bank or insurance company, provided, that nothing in this act contained shall be so construed as to confer banking powers or privileges upon any such corporation.*

"No foreign corporation shall be deemed to be transacting business in this state solely by reason of the performance of any of the acts hereinabove authorized." (*Italics supplied.*)

Foreign insurance companies licensed to do life insurance business in Illinois may invest by lending money on notes secured by mortgages on real estate in Illinois without obtaining a license to engage in the investment loan business, and such mortgage loans are valid as a necessary incident to the life insurance business and in view of the fact that the General Corporation Act of Illinois requiring foreign corporations to procure licenses to do business in Illinois is inapplicable to licensed insurance companies. *Metropolitan Life Insurance Co. v. Whitestone Management Co.*, C. C. A. 7th Cir., Ill., 77 Fed. 2d 255, 260 (1935), certiorari denied, 296 U. S. 632, 80 L. Ed. 449, 56 S. Ct. 155; *Prudential Insurance Co. of America v. Richman*, 292 Ill. App. 261, 267 (1937).

Business corporations, or corporations for pecuniary profit, may be organized under the Business Corporation Act for any lawful purpose or purposes, except for the purpose of banking or insurance or the operation of railroads, as provided in Section 157.3 of Chap. 32.

Under Section 157.5 of Chap. 32, they have the following power:

"(i) To invest its surplus funds from time to time and to *lend money for its corporate purposes, and to take and hold real and personal property as security for the payment of funds so invested or loaned.*
* * *

Corporations organized under the General Incorporation Act of 1872 (repealed) were not authorized to engage in the business of banking or lending money. *American Credit & Trust Co. v. New Era Chandelier Co.*, 208 Ill. App. 181 (1918); *Mercantile Trust Co. of Illinois v. Kastor*, 191 Ill. App. 219, affirmed 273 Ill. 332 (1915). Loans are now limited to corporate purposes.

Domestic insurance companies may invest in the securities set forth in Sections 125 to 125.9, both inclusive, of the Insurance Code, being Sections 737 to 737.9 of Chap. 73.

Section 125.2 of the Act (Section 737.2 of Chap. 73), added by Act of July 17, 1959, Laws 1959, p. 1431, Section 1, provides in part as follows:

"Entire *first mortgages on improved unencumbered* real estate or the entire issue of bonds secured thereby within any of the states of the United States or the District of Columbia, and upon leasehold estates in improved real property for a term of years where 25 years or more of the term is unexpired, and where unencumbered except by rentals accruing therefrom to the owner of the fee, and where the mortgagee is entitled to be subrogated to all right under the *leasehold, worth at least 50% more than the amount loaned thereon*, said worth to be substan-

tiated by the appraisal of 2 landowners, or by a recognized and experienced real estate appraiser, which the Director may accept if he is satisfied that said appraisers are competent and disinterested; and before making such investment a certificate of the value of such property, based on such appraisal, shall be executed by the board of directors or by an investment committee of the board of directors making or authorizing such investment on behalf of the company; including the equity of the seller of the property in contracts for deeds, covering the entire balance due on bona fide sales of the kinds of real estate described in this Section, for *not to exceed two-thirds of the actual sale price*; provided there is and has been no default in the payment of any part of the principal and there is no default in interest, and provided further that the investment in *any one mortgage* or any one issue of bonds, or any one leasehold estate, or any one contract for deed *does not exceed \$10,000 or 2% of the company's admitted assets, whichever is the greater*.

"Any first mortgage which otherwise complies with the requirements of the preceding paragraph need not be an entire mortgage provided that (1) each participant in such mortgage is an insurance company authorized to do business in this state or (2) the interest of any domestic company therein exceed 50% of the unpaid balance of such mortgage at the time of purchase, and provided further that the original investment of each participant in any such mortgage is not less than \$200,000.00.

"By improved real estate as used in this section is meant all farm land which has been reclaimed and is used for the purpose of husbandry, whether for tillage or pasture, and all real property on which permanent buildings suitable for *residence* or commercial use are situated.

"Real property for the purpose of this Section *shall not be deemed to be encumbered* within the meaning of this section by reason of the existence of instruments reserving rights-of-way, sewer rights and rights in wells, nor by reason of building restrictions or other restrictive covenants, nor by reason of the fact it is subject to lease under which rents or profits are reserved by the owners; provided that the *security* for such investment is a full and unrestricted *first* lien upon such real property and that *there is no condition nor right of re-entry for forfeiture under which such investments can be cut off, subordinated or otherwise disturbed*.

"Notwithstanding the restrictions herein set forth any domestic company may invest (1) in bonds or notes secured by mortgage or trust deed insured by the Federal Housing Administrator, or in debentures issued by him under the terms of an Act of Congress of the United States entitled the 'National Housing Act', and (2) in securities issued by National Mortgage Associations established by or under the authority of the National Housing Act, and (3) in any bonds or other obligations of a housing authority, as authorized by Section 28 of 'An Act in relation to housing authorities', approved March 19, 1934, as amended, and (4) in any mortgage of neighborhood redevelopment corporation as authorized by Section 41 of 'An Act to provide for the eradication of slum and blight areas and the rehabilitation and rebuilding thereof through the medium of neighborhood redevelopment corporations, with powers of eminent domain, approved July 9, 1941, and (5) in bonds or notes secured by mortgage or trust deed guaranteed as to principal by the administrator of veterans' affairs pursuant to the provisions of Title III of an Act of Congress of the United States of June 22, 1944 entitled the 'Servicemen's Readjustment Act of 1944', as heretofore or hereafter amended. * * *

"Notwithstanding the restrictions herein set forth the amount of any first mortgage investment as limited by the first paragraph of this Section may be exceeded if and to the extent that such excess shall be guaranteed by the administrator of veterans' affairs, pursuant to the provisions of Title III of an Act of Congress of the United States of June 22, 1944 entitled the 'Servicemen's Readjustment Act of 1944', as heretofore or hereafter amended.

"No such domestic company shall in any manner, either directly or indirectly, by means of corporations, holding companies, trustees or otherwise, invest in real estate securities *junior* to first mortgages. Such domestic company shall not invest in excess of 50% of its *admitted assets* in the securities described in *this* Section and Section 125.15." (Italics supplied.)

Said Section is also added by a prior Act, of July 14, 1959, Laws 1959, p. 973, Sec. 1, which has, in lieu of "worth at least 50% more than the amount loaned thereon", appearing in the first paragraph of the July 17 Act, the following: "Worth at least 33 $\frac{1}{3}$ % more than the amount loaned thereon", and in lieu of "not to exceed two-thirds of actual sale price", appearing therein, "not to exceed 75% of the actual sale price."

In our opinion, the provision in such Section 125.2, appearing in both Acts of July 14 and July 17, 1959, namely: "Notwithstanding the restrictions herein set forth any domestic company may invest (1) in bonds or notes secured by mortgage or trust deed insured by the Federal Housing Administrator", etc., must be construed as an exception from the restrictions or limitations as to such mortgages being "first mortgages on unencumbered real estate." "Notwithstanding" means "without prevention or obstruction by" and "in spite of". *State ex rel. Morse v. Christianson*, 262 Wis. 262, 55 N. W. 2d 20, 24 (1952); *State ex rel. Carmean v. Board of Education of Hardin County*, 170 Ohio St. 415, 165 N. E. 2d 918, 923 (1960).

The word "restrictions" has been defined by the courts with reference to limiting investments or loans. Thus, in *State ex rel. Evans v. Stewart*, 53 Mont. 18, 161 Pac. 309, 312 (1916), it is held, in view of the Montana Constitution, Article XI, Sec. 12, providing that the permanent funds of certain state institutions shall be "invested under such regulations as may be prescribed by law", such "primary" plan in omitting from the list of securities available for the investment of permanent public funds, county, city and town bonds, and warrants, and school district bonds which do not constitute the only outstanding issue, did not conflict with Article XI, Sec. 3, providing that public school funds shall be invested so far as possible "in public securities within the state" including school district bonds issued for the erection of buildings, "under the restrictions to be provided by law"; for the phrase "under the restrictions to be provided by law" gives the Legislature power to make the discrimination excluding certain securities from the list of those available for investment, the word "*restrictions*", meaning "The act of restraining or the state of being restrained; limitation; confinement within bounds; that which restricts; a restraint, reservation, reserve"; and the word "*restrict*" meaning: "To prevent (person or thing) from passing a certain limit in any kind of action; limit; restrain. To attach limitations to (a proposition or conception) so that it would not apply to all the subjects to which it would otherwise seem to apply."

The words, appearing in the third paragraph of the Constitutional Amendment, "However, none of the above restrictions" (relating to rates of interest and usury) shall apply to any building and loan association or to industrial loan companies or to credit unions or any bank operating under State or Federal laws "or to any corporations securing money on credit from any Federal intermediate credit bank under the Agricultural Credits Act of 1923", were applicable to the first and second paragraphs of the Constitutional Amendment. *Carter v. Seaboard Finance Co.*, 33 Cal. 2d 564, 203 Pac. 2d 758, 768 (1949). The Court said: "It is clear that the limitations specified in both the first and second paragraphs fall within the general classification of 'restrictions', as that word is used in the first line of the third paragraph. The word 'restrictions' is defined by Webster's New International Dictionary, as well as other standard authorities, as 'that which restricts; a limitation; a restraint; as restrictions on trade.' We discover no good reason why the words 'above restrictions' used in the third paragraph should not apply equally to both the first and second paragraphs. The rational construction of the language demands that they be read as applicable to both."

In our opinion, the phrase "Notwithstanding the restrictions herein set forth any domestic company may invest (1) in bonds or notes secured by mortgage or trust deed insured by the Federal Housing Administrator", etc., means notwithstanding the limitations on mortgage investment as limited by this Section, 737.2, including the restriction that it be a "first mortgage", or not "junior to first mortgages", or "unencumbered real estate." This construction is strengthened by the clear intent of the Legislature expressed in the next to the last paragraph of such Section, evincing an intent to exclude the limitations when and if guaranteed by a Federal agency.

The phrase "Such domestic company shall not invest in excess of 50% of its admitted assets in the securities described in this Section and Section 125.15" (Sec. 737.15), in our opinion, is, however, applicable to investments in bonds or notes secured by mortgage or trust deed insured by the Federal Housing Administrator (or the other categories listed in Paragraph 5 of Section 737.2), for the reason that such limitation specifically includes all securities described in this Section, regardless of their kind or of their being guaranteed, in whole or in part, or other conditions.

In our opinion, therefore, the intent of the Legislature is to allow investment by domestic companies in bonds or notes secured by mortgage or trust deed insured by the Federal Housing Administrator, whether or not such mortgage or trust deed be junior to first mortgages, in that the primary object to be obtained by the legislation in question is that proper security be given the lending institutions, which object is effected under the construction given.

Section 3 of the Illinois Securities Law of 1953, Illinois Revised Statutes, Chap. 121 $\frac{1}{2}$, Section 137.3, provides in part as follows:

"The provisions of Sections 5 and 7 of this Act shall not apply to any of the following securities:

* * * 'K. A note or notes not more than 10 in number secured by a *junior mortgage lien* if the aggregate *principal amount* of the indebtedness represented thereby does not *exceed 50% of the amount of the then outstanding prior lien indebtedness* and provided that the *total amount of the indebtedness* (including the indebtedness represented by the subject junior mortgage note or notes), *shall not exceed 90% of the fair market value of the property securing such indebtedness*; and provided further that each such note or notes shall bear across the face thereof a legend in letters at least 12 point type or larger, as follows: "This Note Is Secured By A Junior Mortgage";' * * *'" (Italics supplied.)

In our opinion, the limitations in the above Section are applicable to the loans now in question.

Trust companies, as required by Section 292 of Chap. 32, in all cities and towns of 250,000 inhabitants or more, before accepting any such appointment or deposit, shall deposit with the Department of Financial Institutions, securities of the par value of \$200,000.00, which deposits shall be maintained, increased or reduced as therein provided. Section 292, requiring such deposit from trust companies as a prerequisite to their doing business in Illinois, has been held not to apply to a mortgage taken by a trust company to secure a debt due it and the mortgage was held not void but foreclosureable by the company. the mortgagor and a creditor being estopped from raising the defense of ultra vires. *Farmers Loan and Trust Co. v. Chi. & N. P. R. Co.*, C. C. (1895) 68 Fed. 412, 416, motion overruled 73 Fed. 314, 19 C. C. A. 477, appeal dismissed 84 Fed. 1017, 28 C. C. A. 681. Likewise, the failure of a foreign trust company to deposit securities, as thus required, will not prevent foreclosing a trust deed executed to it as Trustee to secure the payment of bonds or a loan, where the company is not exercising an active trust. *Morse v. Holland Trust Co.*, 184 Ill. 255, 261 (1900); *First National Bank of Chicago v. Lindberg*, 293 Ill. App. 474, 485 (1938).

Credit unions are governed by Section 496.10 of Chap. 32, which provides in part as follows:

"A Credit Union is expressly prohibited from engaging in the banking business, the business of a trust company, currency exchange, building and loan association, and from making loans upon the security of any interest or equity in real estate."

Trustees are governed by Section 32 of Chap. 148, which provides as follows:

"In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for any trust heretofore or hereafter created, the trustee thereof shall exercise the judgment and care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital. Within the limitations of the foregoing standard, the trustee is authorized to acquire and retain every kind of property real, personal or mixed, and every kind of investment, including specifically but without in any way limiting the generality of the foregoing, bonds, debentures and other corporate obligations, stocks, preferred or common, and *real estate mortgages, which men of prudence, discretion and intelligence acquire or retain for their own account*, and within the limitations of the foregoing standard, the trustee is authorized to retain property properly acquired, without limitation as to time and without regard to its suitability for original purchase." (Italics supplied.)

Section 32, prior to its amendment, specifically authorized investments of trust funds by trustees in "bonds or other obligations of National Mortgage Associations by and under the authority of the National Housing Act, or *in bonds or notes secured by mortgage or trust deed insured by the Federal Housing Administrator*, or debentures issued by him, or in first mortgages upon real estate in any state, * * * or in the first mortgage bonds of any corporation of any state upon which no default in payment of interest shall have occurred, for a period of five years, but no trustee shall be authorized by this Act to invest trust funds in any bonds in which cautious and intelligent persons do not invest their own money." (Italics supplied.) In our opinion, trustees may still invest in the categories of securities above listed in Section 32 prior to its amendment, including bonds or notes secured by mortgage or trust deed insured by the Federal Housing Administrator, even though such mortgage or trust deed be a junior security, such securities being real estate mortgages which men of prudence, discretion and intelligence acquire or retain for their own account, within the standard of Section 32 as amended.

We conclude, therefore, that state-chartered lenders can participate, under Illinois law to the extent and within the limits above set forth, in the program permitting FHA insured loans not to exceed \$10,000.00 per unit for rehabilitation purposes under the 1961 amendments to Sections 220 and 203 of the National Housing Act.

LEVY ON MONEY HELD BY POLICE CUSTODIAN

(Superintendent, Chicago Police Department—B. M. K.—October 26, 1962)

In your letter of October 22, 1962, you requested an opinion as to your procedure when a writ of levy of the Internal Revenue Service is served on all or part of cash being held by the police custodian's office. You point out the conflict that arises when the Municipal Court, in a proper suit, orders the money returned to the owner while the Federal Government, through its levy, is ordering that the money be turned over to it.

In the specific case that you mention, that is the James Johnson case, \$6500.00 was taken from Mr. Johnson pursuant to arrest; shortly thereafter another arrest was made and an additional \$1600.00 was taken from Mr. Johnson. On October 15th, Judge Kowalski in a civil action issued an order that this entire amount be returned to James Johnson. Through our efforts, an agreement with the Internal Revenue Service and the defendant was effected whereby \$1900.00 would be turned over to the Federal Government and the balance would be returned to the defendant Johnson. The levy of the Internal Revenue Service would be released and this release would be given the custodian at the same time that the attorney for the defendant presented the judgment order issued by Judge Kowalski. I am informed by the custodian's office that this has been done.

The law is clear, in our opinion, that the writ of levy of the Internal Revenue Service must be honored and that compliance with this writ is a complete defense to a civil action brought for the return of the money. As a practical matter, however, the police custodian has been notifying us immediately upon receipt of a writ of levy so that we may contact the Internal Revenue and your department for specific details in each case. This procedure has helped us to work out these matters with the legal framework previously stated, i.e., the writ of levy supersedes any action brought for the return of the money. It is our suggestion that this procedure continue.

AIRPORT BOARD FUND

(City Comptroller—J. E. S.—December 17, 1962)

Your letter of recent date advises that the City of Chicago has spent \$2,398,940 for the acquisition of certain parcels of land at Chicago-O'Hare International Airport, said sum having been charged against the Airport Bond Fund of 1957.

You further advise that the Federal government has presently under consideration a construction program at said airport approximating \$2,672,400.

In further discussing the above acquisition sum it is inferred that one half of same, or \$1,199,470 is cash covering allowance for land already acquired by the City. Thereafter, as is stated in your letter, it has been your practice to credit all collections to the fund from which the expenditure was made and by following this practice the \$1,199,470, when received, would be credited to Fund 431-Airport Bonds of 1957. It is then requested that this department determine whether these federal grants may be construed as gifts to the City and hence may be used for further airport expansion or whether they must be credited back to the fund from which the expenditure was made.

As you are aware, the Airport Bond Fund of 1957 permits expenditures therefrom for acquisition of land at Chicago-O'Hare International Airport and for construction of certain improvements at Chicago Midway Airport. Since the date of its passage land necessary for the operation of O'Hare Field has been acquired with payment being made therefor from the proceeds of said bond issue.

The Federal Government has from as early as 1785 from time to time adopted legislation which provided for federal grants in one form or another intended to promote programs deemed to be of national interest but generally to be administered at a state or local level of government. The Federal Government's entry into airport construction and development occurred as a by-product of the depression and latterly was prompted by military considerations. The national expenditures for relief and defense airport programs by various relief and civilian agencies of government approximated \$705,000,000. In 1946 the Federal Airport Act, under which the grants in question are issued, was approved (49 U. S. C. 1101, et sub.).

Under the Federal Airport Act the Civil Aeronautics Administrator (Administrator of the Federal Aviation Agency) was directed to prepare and thereafter periodically revise the national airport plan with which the entire Federal Aid Airport Program would be consistent. The Federal Aid program embodied in the Federal Airport Act is similar in scope and operation to federal grants in aid of other programs. The term "grant" in a question involving the administration of federal grant in air programs has been defined as "to bestow or confer with or without compensation" and "a gift or bestowal by one having control or authority over it" as of land, money, etc. (*Palmer v. U. S. Civil Service Commission*, 191 Federal Supplement 495).

Again, the systems of federal grant in aid to the states has been defined "as a scheme by which the national government offers to match the states, dollar for dollar, or on some such basis in promoting enterprises which are properly within state jurisdiction but need to be speeded up." (Federal Grants in Aid. Report of the Committee on Federal Grants in Aid, The Council of State Governments.)

Under Section 4 of the Federal Airport Act of 1946 (49 U. S. C. 1103) the administrator is authorized within the limits of the obligation authority provided in Section 5, to make *grants of funds* to sponsors for airport development.

Under Part 550.1 (p), Federal Aid to Public Agencies for Development of Public Airports, Regulations of the Administrator of the Federal Aviation Agency, issued under Sections 1 to 15 of said Act,

"Project costs means any costs involved in accomplishing a project, including those of making field surveys, preparation of plans and specifications, accomplishment of or procurement of the accomplishment of such work, supervision and inspection of construction work, and acquisition of land or interests therein or easements through or other interests in air space, and also including administrative and other incidental costs incurred specifically in connection with the accomplishment of a project, and which would not have been incurred otherwise."

Under Part 550.4 "Project costs. (a) Eligibility. All project costs, as defined herein, including the value of land, labor, materials and equipment donated, contributed or loaned to the sponsor and appropriated to the project by the sponsor, shall be eligible for consideration as to their allowability * * *

for the purpose of computing the amount of a grant if it meets certain therein stated conditions (See Decision of the Comptroller General of the United States No. B-81321, November 19, 1948).

Thus, in our opinion, the sponsor can include as heretofore outlined, 100% of the actual cost, if purchased, or 100% of the value of a gift or dona-

tion of lands or other items to a maximum of either 25% or 50% of the total project cost, depending upon the nature of the project and the percentage of Federal participation therein. Therefore, in order to answer your specific question, the manner in which it is presented to this office must be first revised to show the actual extent of the proposed project rather than being limited to the figure of either \$2,825,450 for improvements or of \$2,672,400 for costs as stated in your letter, the project cost actually totals \$5,224,390, of which \$2,551,990 is contributed by the City of Chicago and \$2,672,400 by the Federal Government.

If the Federal Government for its own purposes desires, rather than to show it is matching all of the construction costs against all of the previously expended land costs of the City, to show that they are first giving us one half of the value of the land previously acquired, which we can then immediately apply to meet one half of the construction costs, that is a matter peculiarly within the departmental processes of the Federal Government.

The purposes of the bond issue by the initial purchase of real estate have been achieved and the money for purposes of the bond issue has been expended. Thus, it is the opinion of this office that the entire Federal Grant for the project in question must be considered as a grant or conditional gift to be used only for the purposes outlined in the project, and as agreed to in the Agency and Participation Agreement with the State of Illinois must be set aside in a special fund for the purposes of the project (See Section 38, Illinois Aeronautics Act).

Answer to your further question relative to consulting and engineering fees must of necessity be withheld pending examination of a project application involving same.

FEDERAL GOVERNMENT'S RIGHT TO LEVY

(Acting City Comptroller—E. W. P.—March 8, 1965)

We are transmitting to you letter dated March 3, 1965 from Hon. William T. Prendergast, City Collector, together with attached Notice of Levy by the U. S. Treasury Dept.-Internal Revenue Service, which letter and form are self-explanatory. The levy is made on the unused license deposit for Public Place of Amusement Receipt No. 13256 dated December 28, 1964, by the U. S. Treasury Dept., Internal Revenue Service. It is our opinion that the levy should be recognized and check for \$25.00, constituting the unused license deposit from the Applicant, John Voss, paid to the Director of Internal Revenue Service, 3611 N. Kedzie Avenue, Chicago, Illinois, 60618, their File No. N:4:Leibow.

We do have a decision that the City is not subject to garnishment or attachment. It is well settled in Illinois that municipal corporations are not subject to attachment, including levies, or garnishment proceedings which are designed to protect private interest or private convenience (*Mervin v. City of Chicago, et al.*, 45 Ill. 133). However, this rule of law, in our opinion, does not embrace a procedure of demand and levy by the United States Government. It is our further opinion that you should make the proper notation in your file, approve the payment, and issue the voucher payable to the Director of Internal Revenue.

CODE NOT APPLICABLE TO GOVERNMENT BUILDINGS

(General Service Administration—S. R. D.—November 26, 1965)

We acknowledge receipt of your letter of October 1, 1965 supplemented by your letter of November 24, 1965. You state that the building at 844 North Rush Street, Chicago, Illinois, is owned and operated with government employees, including the operation and maintenance of the building's boilers. You state that the boilers operate at 12 PSIG for 24 hours a day and are automatically controlled with standard safety code controls of operation.

You refer us to Chapter 174 of the Municipal Code of Chicago, which pertains to stationary engineers and boiler tenders, and ask if the building at 844 North Rush Street is exempt from the provisions thereof.

In *Thiele v. City of Chicago* (1957), 12 Ill. 2d 218, the court held that buildings under government control are not subject to the provisions of the Municipal Code of Chicago. Further, Section 84-1 of the Municipal Code of Chicago specifically provides as follows:

"The following provisions shall apply to every steam boiler and every unfired pressure vessel except tanks containing only water under the pressure in the city mains. It does not apply to boilers on railroad locomotives or to boilers that are subject to federal inspection and control."

In light of the foregoing, we are of the opinion that the government owned building and the boilers located therein are exempt from the provisions of Chapter 174 of the Municipal Code of Chicago.

WHEEL TAX EXEMPTION FOR FEDERAL EMPLOYEES

(Administrative Assistant, U. S. Public Health Service Hospital—B. Q. O.—February 1, 1966)

We are in receipt of your letter of January 21, 1966, to which was attached a copy of a letter dated January 2, 1963, from the office of the Corporation Counsel to Dr. McNaughton, Medical Advisor of the U. S. Public Health Service, 4141 N. Clarendon Avenue, Chicago, Illinois, in which it is stated that federal employees who live and garage their cars in the U. S. Marine Hospital (now the U. S. Public Health Service Hospital) come within the same classification as army or navy officers stationed on military reservations in that they do not "reside within the City of Chicago" and are, therefore, not subject to the payment of wheel tax license fees.

You state in your letter that this hospital has undergone a transition from a hospital to an outpatient clinic but that the staff doctors and several other federal employees continue to live and garage his/her car on the U. S. Public Health Service Hospital (formerly U. S. Marine Hospital) reservation.

You inquire as to whether the law, as stated in the aforesaid letter of the Corporation Counsel, is still in effect.

In our opinion, although this hospital has undergone a transition from a hospital to an outpatient clinic, it is still a federal reservation and, therefore, the law in question, which is unchanged, is still in effect and applicable to the factual situation stated in your letter.

The present City Clerk is John C. Marcin and the present Chief of Traffic is Terrence T. Doherty.

Section B. CHICAGO PARK DISTRICT

EFFECT OF PUBLIC WAY ORDERS

(Commissioner of Streets & Sanitation—J. L. F.—March 15, 1961)

Your recent letter advises us that Henry C. Dreschler and Saul R. Fellers, the owners of the property at 1555 N. Dearborn Street, through their contractors, the Sumner Sollitt Company, have requested permits to construct underground parking facilities on N. Dearborn Street and West North Avenue, adjacent to their property.

You state that the basis for the application for this permit is that on February 13, 1957 the Chicago Park District authorized its issuance by passage of an Order reading as follows:

"Permit To Use Sub Surface Area: Henry Dreschler And Saul R. Fellers (58).

Ordered, That a permit be granted to Henry C. Dreschler and Saul R. Fellers to use and occupy the sub-surface area and to construct an underground parking area at the southeast corner of N. Dearborn Parkway and W. North Boulevard (commonly known as 1555 N. Dearborn Parkway), to provide a sufficient area for the parking of cars by tenants of the aforesaid building to comply with the requirements of the Code of the City of Chicago; said construction work to be done in accordance with plans approved by the general superintendent and further subject to the provisions of the Code of the Chicago Park District relating to the use of sub-surface space."

You inquire our advice as to whether or not said Order as passed by the Chicago Park District makes it mandatory upon your office to grant the owner permission to construct the aforesaid facility under the public way.

We are of the opinion that when the City of Chicago on January 1, 1959, pursuant to Statute assumed jurisdiction and control of the public ways theretofore under jurisdiction and control of the Chicago Park District, it became obligatory upon the City to comply with the provisions of said Order passed by said Park District on February 13, 1957.

CITY'S RIGHT OF INSPECTION

(General Superintendent Chicago Park District—J. C. M.—November 10, 1961)

In reply to your letter of November 1, 1961, we beg to advise you that it has always been the position of the City of Chicago that the Chicago Park District is subject to building inspections, health inspections such as food and that its contractors for the construction of any structure are required to take out building permits. In *County of Cook v. City of Chicago*, 311 Ill. 234, the County of Cook sought an injunction against the City of Chicago from enforcing its fire and building ordinance against the county in connection with the construction of a county jail located within the territorial limits of the city. The Supreme Court has held that the ordinances

were applicable to the County of Cook. In a lengthy opinion, the court said on page 247:

"We are of the opinion that the police power delegated to the city must be construed, as between the county and the city, as a delegation of a power to the latter which the former is expected to observe."

There are pertinent provisions in the Cities and Villages Act, Chapter 24, Sections 23-70, 23-71, 23-72, 37-2 and 37-3, which are now in the Illinois Municipal Code. Sections 11-30-4, 11-8-3, 11-8-2 and 11-37-3.

There are other sections relating to other building inspections such as elevators, plumbers and mason contractors that are generally known and are still retained in the Illinois Municipal Code.

In our opinion, the decision in *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392 relating to the levy of a special assessment upon park property by the City of Chicago has no application to the question involved.

SUPERVISION OF CITY OVER PARK DISTRICT

(Chairman, Committee on Forestry and Recreation—R. J. C. & S. R. D.—January 29, 1962)

We acknowledge receipt of your letter of January 22, 1962 referring to a resolution presented to the City Council (C. J. 9-27-61, p. 5525); which resolution proposed that the Committee on Forestry and Recreation conduct an "inquiry" into certain newspaper articles relating to the Chicago Park District and its civil service practices. You request an opinion as to the power, if any, of the City Council to investigate the operations of the Chicago Park District.

It is well settled that the City of Chicago, like all other municipal corporations, derives its existence and its powers from the General Assembly. It possesses no inherent power. Statutes granting powers to municipal corporations are strictly construed, and any fair or reasonable doubt of the existence of an asserted power is resolved against the municipality which claims the right to exercise it. *Father Basil's Lodge v. City of Chicago*, 393 Ill. 246, 252. A city council is limited to the exercise of powers conferred by the State and cannot enlarge its powers by ordinance. *People ex rel. Nelson v. Beu*, 403 Ill. 232, 244. *Cf. Arnold v. City of Chicago*, 387 Ill. 532, 536, 537; *Dean Milk Co. v. City of Chicago*, 385 Ill. 565, 574; *City of Bloomington v. Wirrick*, 381 Ill. 347, 352; *Chicago Cosmetic Co. v. City of Chicago*, 374 Ill. 388, 391; *City of Chicago v. Ingersoll Steel Corp.*, 371 Ill. 183, 186; *Hairgrove v. City of Jacksonville*, 366 Ill. 163, 172; *City of Chicago v. Northern Paper Co.*, 337 Ill. 194, 197; *City of Marquette Heights v. Vrell*, 22 Ill. App. 2d 254, 260.

If express power is given, then the right to conduct investigations has long been recognized. *State ex rel. Holloway v. Rhodes*, 35 N. E. 2d 987 (Ohio, 1940); *Leahy v. City of Knoxville*, 245 S. W. 2d 772 (Tenn. 1952); *In re Radio Station WNYC*, 7 N. Y. S. 2d 297 (1938); *Application for Summons for Attendance of Witnesses Before Committee of Common Council of City of North Tonawanda*, 12 N. Y. S. 2d 128 (1939); *In re Application of Smith*, 26 N. Y. S. 2d 560 (1940); *In re Ellis*, 28 N. Y. S. 2d 988 (1941). Such investigations are to be conducted by legally constituted bodies or committees. *Ex Parte Hague*, 147 A. 220 (N. J. 1929). Statutes relating to compelling witnesses attendance before committees of the city council are to be strictly construed. *People ex rel Webster v. Van Tassel*, 17 N. Y. S. 938; 19 N. Y. S. 643; 135 N. Y. 638, 32 N. E. 646.

The power of the city council to conduct investigations may be conferred upon a committee of that body. *In re Investigation of Contracts of City of Albany and its Officials*, 184 N. Y. §§ 518, 524. An investigating committee for a municipality may be created by resolution and not necessarily by ordinance. *Eggers v. Kenny*, 104 A. 2d 10, 18 (N. J. 1954). It has been held that investigation of private institutions is unwarranted and not even within the powers of the State Legislature. *Greenfield v. Russel*, 292 Ill. 392. The corporate authorities of the City of Chicago are empowered (Ill. Rev. Stat. 1961, chap. 24, par. 10-4-4) :

“ * * * to investigate the enforcement of the municipal ordinances, rules and regulations, and the action, conduct and efficiency of all officers, agents and employees of the municipality.”

An ordinance of the City of Chicago adopted pursuant to such statutory authority was upheld in an investigation of police personnel, the court saying (*Du Bois v. Gibbons*, 2 Ill. 2d 392, 415) :

“ * * * it is not true that the city council * * * may not investigate the police department * * * which is an arm of the city government over which it is given the authority of regulation by State Law and for which it makes an appropriation of over \$27,000,000 annually.” (Emphasis supplied.)

The true nature and purpose of the above statute is to enable corporate authorities in the city to obtain information through investigation of the action, conduct and efficiency of the officers, agents and employees of the municipality to help determine the possible need for legislative changes and to provide a guide for future legislative action, whether by way of new legislation, amendment or repeal. *Du Bois v. Gibbons*, 2 Ill. 2d 392, 400. If this be “the true nature and purpose” of the statute, as the court held in the *Gibbons* case, then the purpose of any investigation of the Chicago Park District would be “to provide a guide for future legislative action” with regard to the Chicago Park District. Even for legislative bodies with broad and inherent powers of investigation (such as the Congress of the United States), an investigation is invalid if unrelated to any legislative purpose and a mere semblance of legislative purpose will not serve to justify an inquiry. *Watkins v. United States*, 354 U. S. 178, 198 (1957).

The 6th Amendment to the Illinois Constitution of 1870 (Const. of 1870, Art. 4, Sec. 34) empowers the General Assembly to enact legislation consolidating the municipal government of the City of Chicago with parks, subject to approval by referendum. However, the General Assembly has not elected to exercise such power. In *The People ex rel. Lindheimer v. Gaylord Building Corp.*, 369 Ill. 371, the court said (p. 378) :

“The Chicago Park District act did not provide a scheme of government for the City of Chicago nor did it provide for the consolidation of existing park districts with the city of Chicago, even though the various parks affected were largely within the Chicago city limits. That act created an entirely new municipal corporation vested with the powers formerly exercised by many smaller government units * * *.” (Court’s Italics.)

The legislature may create any conceivable kind of corporation it deems wise for the more efficient administration of public affairs and endow such corporation and its officers with whatever powers and functions it deems necessary and proper for the administration of the corporate affairs. *Kocsis v. Chicago Park District*, 362 Ill. 24, 30, 31. The primary purpose of the Chicago Park District act was the creation of one great park system in place of smaller and disconnected districts. *The People v. Kelly*, 357 Ill. 408, 412. The power of the General Assembly to create municipal corporations is practically unlimited. It may create any conceivable kind of a corporation

it sees fit for the more efficient administration of public affairs and endow such corporation and its officers with such powers and functions as it deems necessary and proper. For this purpose it may provide for the organization of corporations which embrace territory situated wholly within or partly within and partly without the boundaries of another municipal corporation. *The People ex rel. Curren v. Wood*, 391 Ill. 237, 243.

The Chicago Park District, within the purview of its powers, is a corporation endowed with the same corporate functions, derived from the same source, and exercised in substantially the same way, as the city of Chicago. *It is in no sense a corporation organized to exercise a portion of the municipal powers and functions of the city, and in subordination to it, but, within its own sphere, it has the same rank, and the exercise of its corporate powers is as exclusive of any power on the part of the city to interfere, as if the two corporations occupied wholly separate areas of territory.* *West Chicago Park Commissioners v. Chicago*, 152 Ill. 392, 405. The foregoing significant language points up the independent nature of each corporation. They are as unrelated as the City of Chicago and the City of Evanston. And it makes no difference who appoints the park commissioners. *Love v. Glencoe Park District*, 270 Ill. App. 117, 121. Park districts are the creation of the legislature, organized as municipal corporations as subdivisions of the governing authorities of the State of Illinois. *The People ex rel. Ammann v. Wabash Railroad Co.*, 391 Ill. 200, 208. It is to be noted they are subdivisions of the State, not of the City of Chicago.

Cities, school districts and other municipal corporations created by authority of the legislative derive all their rights and powers from the source of their creation. *People ex rel. Gutknecht v. City of Chicago*, 414 Ill. 600, 621.

Every park district is a municipal corporation, empowered to pass ordinances, rules and regulations (Ill. Rev. Stat. 1961, chap. 105, par. 8-1). The Chicago Park District was approved by referendum in 1934 and is governed by a board of park commissioners who are appointed by the Mayor of the City of Chicago with the approval of the City Council (Ill. Rev. Stat. 1961, chap. 105, par. 333.3). The Chicago Park District prepares its own budget and appropriation ordinance, it may levy and collect a general tax and it may issue bonds (Ill. Rev. Stat. 1961, chap. 105, pars. 333.17, 333.19, 333.20).

The Chicago Park District is, by statute, subject to the Civil Service in Parks Act (Ill. Rev. Stat. 1961, chap. 24½, pars. 78, *et seq.*) just as the City of Chicago is subject to the Cities Civil Service Act (Ill. Rev. Stat. 1961, chap. 24, pars. 10-1-1, *et seq.*; chap. 24½, pars. 51, *et seq.*). Under the Civil Service in Parks Act, *the park board shall investigate the efficiency of all officers and employees, and oaths may be administered and subpoenas issued in connection therewith* (Ill. Rev. Stat. 1961, chap. 24½, par. 93). There is no statutory authority for the City of Chicago to investigate the civil service procedure in another municipal corporation. Certain functions of the Chicago Park District and the City of Chicago have been interchanged by the 1957 Act and this exchange has been sustained. *Alexander v. City of Chicago*, 14 Ill. 2d 261.

In addition to powers expressly granted, municipal corporations possess such implied powers as are necessarily incident to the powers expressly granted. The City Council does have the express power to investigate employees of the City (Ill. Rev. Stat. 1961, chap. 24, par. 10-4-4). However, while the foregoing grant of authority establishes the *existence* of a limited regulatory power, it also determines the *extent* of that power. *Pure Oil Co. v. City of Northlake*, 10 Ill. 2d 241, 245.

In light of the foregoing, we are of the opinion there is no authority in the City Council of the City of Chicago to investigate the activities of the officers and employees of the Chicago Park District.

UNDERGROUND PARKING

*(Division Marshal in Charge, Bureau of Fire Prevention—E. W. P.
—December 14, 1962)*

Reference is made to ordinance passed October 11, 1962, by the City Council of the City of Chicago set forth on pages 7815 to 7817, which ordinance authorized and granted a perpetual easement from the City of Chicago to the Chicago Park District for construction of underground parking facility in and under portions of S. Michigan Avenue and E. Jackson Boulevard, Chicago, Illinois.

The ordinance provides for the construction of a three-level underground parking garage to be located between the west right-of-way line of the Illinois Central Railroad and the west curb of S. Michigan Avenue and between the south building line of the Art Institute and the north line of E. Van Buren Street. This improvement had been previously approved by the Department of City Planning and the Bureau of Street Traffic and conforms with the objectives of the Development Plan for the Central Area.

The agreement for this perpetual easement has been approved by the Mayor, the City Clerk, the Commissioner of Public Works, the Commissioner of Streets and Sanitation and the Corporation Counsel. The City of Chicago, by the terms of this agreement, has given, granted and conveyed to the Chicago Park District a perpetual easement, right, privilege and authority to construct this underground parking facility. The Park District has agreed to assume and bear all responsibility and to indemnify, reimburse, save and keep harmless the City from any loss, damage, cost or expense, which it may suffer, incur or sustain, or for which it may become liable, and releases the City of Chicago from any and all liability and all damages thereto on account of the location, construction, reconstruction, alteration, repair or maintenance.

Plans have been submitted and the Park District is in a position to proceed with the construction. The question arises whether or not under the Municipal Code the Chicago Park District is required to install a sprinkler system. June 27, 1960, we furnished you with an opinion in response to a letter from your department of June 17, 1960, as to the necessity of a sprinkler system in a one-story and basement building of Type 1-A construction, and on page 2 we quoted the section, Section 64-1.2(d), which provides that automatic sprinkler systems shall be provided in any basement garage space having a capacity of more than three vehicles. We further stated in our opinion that the intent clearly expressed in the Municipal Code is to provide the sprinkler system in any basement garage space. We were in that opinion considering parking facilities, i.e., multi-level structures in which each level is used primarily for the purpose of storing passenger motor vehicles and which does not necessarily have enclosing walls as well as garages, including basement garage space.

The purview of that opinion, however, does not embrace the parking facilities owned, constructed, equipped, managed, controlled, maintained and operated by the Chicago Park District.

It is our opinion, based on the statutory provisions which give authority to the Chicago Park District contained in Section 25.1, Chap. 105 of the Ill. Rev. Stats., and the ordinance of October 11, 1962, by the terms of which the City of Chicago has granted and conveyed to the Park District a perpetual easement, right, privilege and authority to construct and maintain this underground facility, that the provisions of the Municipal Code relating to the necessity of a sprinkler system in certain type buildings and garages are not applicable. It is assumed that the Chicago Park District will provide adequate safeguards in the rules and regulations made and provided by the Commissioners of the Chicago Park District in accordance with Section 25.7 of the Statutory Act, and it is our further opinion therefore that the Chicago Park District should be permitted to proceed in accordance with their plans.

MAINTENANCE OF PASSAGES

(Commissioner of Streets and Sanitation—J. O. T.—February 10, 1964)

Attached you will find copies of three opinions previously rendered by this office relative to the matter of responsibility and jurisdiction of the City of Chicago for the maintenance of certain pedestrian subway passages which prior to the Park District Consolidation had been maintained by the Park District. From these opinions the following principles may be deduced:

1. When the City of Chicago took over jurisdiction of all the streets and boulevards from the Chicago Park District, its jurisdiction extended not only to the surface thereof but overhead and subway passages and it became the duty of the City to maintain the same. This applies, of course, to the underpass mentioned (Opinion of Oct. 9, 1959).

2. “. . . underpasses . . . situated wholly within the Chicago Park District . . . remain under the control and jurisdiction of the Chicago Park District and the duty of cleaning them is not on the City.” (Opinion of Feb. 10, 1960.)

3. The City of Chicago may enter into a contract with the Chicago Park District covering the maintenance of such a subway (Opinion of Oct. 4, 1960).

The conclusion from the above opinions is therefore that if the particular underpass is not wholly within the Chicago Park District the City must maintain it. If the underpass is wholly within the Chicago Park District, said District must maintain it.

To effectuate the purposes of the consolidation statute (Ill. Rev. Stat. 1963, ch. 105 § 333.51 et seq.) such an underpass can be considered a “utility” and thereby resolve jurisdictional problems under section 333.69 which provides:

“If any surface or subsurface utilities serve parks and boulevards and it is either impossible or impractical to separate the maintenance and operation of such utilities between parks and boulevards, the park district and the city may by agreement provide that either the park district or the city may maintain and operate such utilities upon such terms, conditions and compensations as shall be reasonable.”

TRANSFERRED PARK DISTRICT EMPLOYEES

*(Commissioner, Department of Street and Sanitation—G. F. M.—
February 27, 1964)*

In response to your request for an opinion concerning certain employees of the Chicago Park District who were transferred by the Functional Consolidation Act of 1959 to the Bureau of Street Traffic of the City of Chicago, the following is submitted:

Your letter states that certain employees were transferred from the Chicago Park District to the Bureau of Street Traffic, some of whom were Civil Service and others were on a temporary basis; that when transferred the employees remained as members of the Park Employees' and Retirement Board Employees' Annuity and Benefit Fund; that the Park District has a compulsory retirement provision upon attainment of age 65. Your question is whether or not former Park Employees now working for the City of Chicago are required to be retired at age 65, or whether the rules of the City of Chicago, as far as employment procedures are involved, apply.

At the time former employees of the Park District were transferred under the aforementioned Consolidation Act to the services of the City of Chicago, certain city employees were transferred by the same Act to the Chicago Park District. The Chicago Park District has enforced their compulsory retirement age as to such employees who were transferred from the City of Chicago to the Park District, even though such employees still remained as members of the Municipal Employees Annuity and Benefit Fund of Chicago or the Laborers' and Retirement Board Employees' Annuity and Benefit Fund of Chicago.

As the Park District has enforced its compulsory retirement act as to those employees who were transferred to it from the City of Chicago, they consider them to be employees of the Park District. It follows that those employees who were transferred from the Park District to the City of Chicago have become employees of the City of Chicago. As such former Park employees are now employees of the City, even though they have retained it their pension rights in the Park Employees' and Retirement Board Employees' Annuity and Benefit Fund, the rules governing employees of the City of Chicago are applicable to these employees just as though they had been employees of the City of Chicago during their entire period of employment. The Act governing the Park Employees and Retirement Board Employees Annuity and Benefit Fund does not contain any provision having to do with enforced retirement, but such retirement is controlled by the Park District Civil Service Act.

We are, therefore, of the opinion that former Park District employees who were transferred to and became employees of the City of Chicago are governed by the rules of the City of Chicago as far as employment procedures are involved, and are not subject to the compulsory retirement rule of the Park District. We are further of the opinion that the classification of the employees as civil service or temporary does not affect their status as to enforced retirement.

AUTHORITY OF THE POLICE POWER OF THE CITY

(*Director of Special Events—C. J. O.—March 7, 1966*)

Your letter of November 17, 1965, addressed to Raymond F. Simon, Corporation Counsel, has been referred to the undersigned for reply. You inquire as to the application of ordinances of the City of Chicago to the Chicago Park District and the Metropolitan Fair and Exposition Authority (McCormick Place).

It should be noted that a municipal corporation is created by and derives its powers from the Illinois General Assembly, which are set forth in the various enabling acts that created them. The Chicago Park District, hereinafter referred to as the "Park District," was created by the Legislature in the Park District Code (Ill. Rev. Stat. 1965, Ch. 105, pars. 333.1 to 333.51), and its powers are essentially set forth in Paragraph 333.7, entitled "Powers of the Chicago Park District," as limited by Paragraph 333.52 of the same Code.

The Corporation Counsel has recently rendered an opinion that the District is subject to the building code as well as other ordinances (Opinions of the Corporation Counsel, Vol. 24, p. 233, February 8, 1957). In that opinion, we affirmed another opinion on the subject (Opinions of the Corporation Counsel, Vol. 19, p. 73), in which we said (Vol. 24, p. 234) :

"However, in relation to buildings erected in parks within the city of Chicago, we think a different situation prevails. Park boards are given no police power concerning the construction of buildings, the prevention of fires, the making safe of dangerous constructions. The legislature by statute in this State has conferred on municipal corporations, such as cities, villages and incorporated towns, the police power to prescribe fire regulations and to regulate buildings within their limits in respect to fire protection (ISBS '35, chap. 24, art. V, paras. 61, 62, 63), and we believe that this power may be exercised over territory controlled by another municipal corporation."

The Metropolitan Fair and Exposition Authority, hereinafter referred to as the "Authority," is the managing corporation of McCormick Place, and derives its authority from an act designated by the same name (Ill. Rev. Stat. 1965, Ch. 34, pars. 6001-6028). Included among the powers delegated to the Authority are that it may own or lease property, sue and be sued in its own name, enact ordinances and impose penalties, promote, operate and maintain fairs and conventions, procure and enter contracts, and similar powers necessary to attain its purposes. Most notably, Paragraph 6009 grants authority to enter into contracts of insurance and indemnity. As suggested by the Supreme Court in the *Molitor* series of cases, *Molitor v. Kaneland Community Unit District*, 18 Ill. 2d 11, either self-insurance or indemnity insurance should be used to fill the vacuum created by the loss of governmental immunity.

The above powers are similar to the Chicago Park District in that both are quasi-municipal corporations designed for a specific purpose. As such, they are considered of lesser significance and authority than are true municipal corporations such as cities and villages. Examples of quasi-municipal corporations are school boards, counties, and various other authorities. The relevant distinction between the two types of municipal corporations is that general police powers are conferred upon true municipal corporations alone and are denied to quasi-municipal corporations, unless specifically granted to them by their enabling act. Thus, it follows that neither the Park District nor the Authority possess general police powers.

The Supreme Court stated, in the case of *County of Cook v. City of Chicago*, 311 Ill. 234 (p. 242) :

"There is no delegation of police power to the counties and townships of the State, and it would seem clear, therefore, that by the delegation of the police power to cities, villages and incorporated towns the legislature intended that the exercise of that power over the property and inhabitants within the limits of the city or village should be by that municipality, subject, of course, to the right of the

State, of which it is never divested, to exercise the police power." Further, on page 246, the Court stated:

"The powers granted to the counties under the general law do not include the police power. That power is granted to cities and villages under the act concerning their incorporation and by that statute it extends to all buildings within its limits. The county is not required to build a court house within the limits of any city but may build it elsewhere if directed so to do by the people, or may maintain or condemn land of its own volition without a vote of the people. (*County of Mercer v. Wolff, supra.*) When the county builds a court house within the limits of a city it may be held that in so doing it acts voluntarily. No good reason, therefore, is perceived why it should not be made amenable to the reasonable police regulations imposed by the city in the interest of the general welfare."

While it is axiomatic that two municipal corporations may not entertain identical coextensive jurisdiction over the same subject matter, the term "subject matter" refers to the *particular activity* in question, and is not related necessarily to ownership of the subject property. Incidents of ownership are immaterial to the problem of jurisdiction. (*People v. Nelson*, 133 Ill. 565.)

McCormick Place, as we have previously stated, is operated by the Metropolitan Fair and Exposition Authority. The site of the structure belongs to the Chicago Park District, which leased the realty to the Authority. The Park District ownership of the property is immaterial to the question of management. Because of the proliferation of governmental bodies, certain of their functions and activities are interlocking with other agencies. (*West Chicago Park Comm. v. City of Chicago*, 152 Ill. 392.)

The Authority has been granted management powers through the statutory provisions hereinabove cited. As to the rental of the facilities of the site, and the promotion of exhibitions, as well as the other enumerated activities, the Authority has absolute and exclusive power under these provisions.

The City of Chicago, however, has jurisdiction in matters flowing from its police power, *i.e.*, police, health and welfare. Thus, such ordinances as the building code, police and fire ordinances, health and sanitation, and licensing provisions, not in conflict with powers of the Authority, are applicable.

Questions pertaining to possible tort liability, set forth in your memorandum, could be answered only upon consideration of the alleged tort involved in order to determine which municipal corporation would be involved, whether the City of Chicago, the Park District or the Authority, and should be directed to the respective attorneys if, as and when they may arise.

Section C. CHICAGO HOUSING AUTHORITY

LAND CLEARANCE COMMISSION

(Alderman, 12th Ward—M. C. H.—May 4, 1961)

This is to acknowledge the receipt of your letter to this office which an opinion is requested on the legality of the Chicago Land Clearance Commission to clear the property involved for the purpose of establishing a Chicago Branch of the University of Illinois in the Harrison-Halsted Area.

Please be advised that the Land Clearance Commission was appointed pursuant to the Blighted Area Redevelopment Act of 1947 as amended (Illinois Revised Statutes 1959, Chapter 67½, Section 63-91) and that said Commission exercises its authority pursuant to said statute. Its function generally is to acquire and clear slum and blighted areas, vacant or otherwise as defined in the statute, to clear such land for redevelopment by the installation of streets and utilities and sell and convey such land for redevelopment in accordance with an approved redevelopment plan.

There is no statutory limitation on the use for which a project area may be redeveloped. Section 19.1 of the Redevelopment Act provides that prior to making a sale or conveyance of any property, the Commission shall prepare and approve a redevelopment plan which shall also be approved by the State Housing Board and the governing body of the municipality.

Section 19 also requires that in order to assure that the property is used in accordance with the approved plan, the Commission shall require a purchaser to execute in writing such undertakings as the Commission shall deem necessary to obligate the purchaser to use the land for the purposes designated in the approved plan. The nature of the redevelopment plan and the use to which the land shall be put was left by the legislature to the discretion of the Commission. Accordingly, the Commission has sold land in accordance with the approved redevelopment plans to be developed for residential, commercial, industrial, educational and hospital uses. And its power to do so has never been called into question by any title insurance company, or denied by any Court.

It has been suggested that there is doubt about the power of a Commission to convey a substantial part of a project area to a public body, such as the University of Illinois, because the intent of the legislature was to provide for redevelopment by private enterprise. In support of this view there is cited a portion of the legislative finding and declaration in Section 2 of the Redevelopment Act, which reads as follows:

"... the eradication and elimination of such areas and the construction of redevelopment projects financed by private capital, with limited financial assistance from governmental bodies, in the manner provided in this Act, are hereby declared to be a public use essential to the public interest."

However, the Illinois Supreme Court has repeatedly held that the public use which supports the right of eminent domain is the eradication and elimination of slum, and once this public purpose is accomplished the manner in which the Commission disposes of the cleared area is immaterial. See *Zurn v. City of Chicago*, 389 Ill. 114; *Chicago Land Clearance Commission v. White*, 411 Ill. 310. Moreover, it is an elementary rule of statutory construction that a statute must be construed in its entirety, and in the absence of a legislative history the legislative intent can only be ascertained by reference to the words the legislature has used.

Section 19 of the Redevelopment Act provides that a Commission may transfer and sell the fee simple title to all or any part of the real property within the area of a redevelopment project

"(3) to any individual, association or corporation, organized under the laws of this State or of any other State or country, which may legally make such investment in this State . . ."

In addition Section 17 provides in relevant part as follows:

"the Commission . . . with the approval of the State Housing Board may convey to that municipality or to any public body having jurisdiction over schools, parks or playgrounds in the area in which the project is situated such parts of such real property for use for parks, playgrounds, schools and other public purposes as the Commission may determine, and at such price or prices as the Commission and the proper officials of such public bodies may agree upon;" (Emphasis supplied).

It thus seems abundantly clear that, aside from the broad language of Section 19, the Commission under Section 17 may in its discretion determine to sell any part of a project area to a public body for public purposes, subject only to the requisite approval of the sale and the redevelopment plan by the City Council and the State Housing Board.

In view of the above, it is our opinion that the Land Clearance Commission has the statutory authority to sell to the University of Illinois, the land in question and that said sale will be upheld in any Court of Record in the State of Illinois.

FEE EXEMPTIONS

(Commissioner of Water & Sewers—W. M. Z.—December 14, 1962)

Please refer to your communication of December 7, 1962, requesting opinion as to whether or not inspection fees and permit fees may be collected by your office in re: projects being constructed or constructed within the provisions of the United States Housing Act of 1937 as amended. May we call your attention our Opinion No. 10572 of December 5, 1941 which reads as follows:

"The Chicago Housing Authority or its contractors are entitled to the issuance of permits and the furnishing of inspection service by the city without charge.

Citations:

Statute: IRS '41, 67½: 28 to 37 (Housing Corporation Law).

Ordinance: Coun. J. (3/8/40), p. 2152."

RESCISSION OF RESOLUTIONS

(Department of Urban Renewal—M. P. W.—January 7, 1963)

You have requested an opinion as to whether the Department of Urban Renewal may legally rescind two resolutions approving for acceptance two offers to purchase redevelopment projects State-51st and State-Pershing, and re-advertise for bids to purchase the projects. You further inquired as to whether the members of the Department of Urban Renewal could be held personally liable by any person claiming injury as the result of said rescission and re-advertising.

The facts are that on July 9, 1962 the Department of Urban Renewal gave public notice that it would receive bids for the purchase of redevelopment projects State-51st and State-Pershing until September 14, 1962. The instructions to prospective bidders stated, among other things, that the Department reserved the right to reject any or all bids, that the price offered would not alone determine the winning bidder, and that all offers were subject to the approval of the City Council and the Housing and Home Finance Agency. We observe in passing that the procedure of disposing of redevelopment project land by competitive bidding pursuant to public notice is not a procedure required by the Urban Renewal Consolidation Act of 1961, but is a procedure the Department elected to follow in this instance in the exercise of its discretion.

On the latter date the several offers to purchase each project were publicly opened and read. After consideration of all offers, on November 8, 1962 the Department accepted the resolutions. Resolution No. 62-DUR-71 "approved for acceptance" the offer of Tamord Development Company to purchase redevelopment project State-Pershing "provided . . . that the foregoing offer is satisfactory to the federal Urban Renewal Administration; and subject to the approval of the City Council of the City of Chicago." Resolution No. 62-DUR-72 "approved for acceptance" the offer of Saul Winston and Associates to purchase redevelopment project State-51st, and contained the identical proviso quoted above.

City Council approval of sales of redevelopment project land is required by Section 26 of the Urban Renewal Consolidation Act of 1961, Ill. Rev. Stat. 1961, Ch. 67½, § 91.126. Urban Renewal Administration approval is required by contracts between the City of Chicago and the United States, entered into pursuant to Title 1 of the Housing Act of 1949, as amended. As of this date neither offer has been accepted by the Department nor has approval of the sales by the City Council or the Urban Renewal Administration been sought by the Department. Instead, the Department has now determined that the public interest will best be served by rescinding the aforesaid resolutions and re-advertising for bids to purchase the projects.

Our opinion is that the resolutions may legally be rescinded and the projects re-advertised for sale, and that the members of the Department of Urban Renewal are immune from personal liability to any person claiming to be damaged as a result of the foregoing actions.

McQuillin, Municipal Corporations, 3rd Ed., § 13.49 states in relevant part as follows:

" . . . the legislative body of the Corporation, or any board or department thereof, possesses the unquestioned power to rescind prior acts and votes at any time thereafter until the act or vote is complete, provided vested rights are not violated . . . "

In the case of *Central Veterans Association of Stafford, Conn., Inc. v. Stafford*, 101 A. 2d 281, the Supreme Court of Errors of Connecticut stated that the power to adopt a resolution carries with it the power to rescind unless irrevocable rights and obligations have been created by the original resolution, and so held that a town resolution directing that particular rooms in the town hall be used exclusively as a meeting place for veterans organizations could be rescinded since it created no irrevocable rights in the general public and did not constitute an irrevocable dedication.

On the same theory the Supreme Court of Illinois held in *People v. Davis*, 284 Ill. 439, that where the City Council voted to concur in the Mayor's appointments of members of the board of education, and at a subsequent meeting reconsidered the matter and voted to non-concur, the appointees acquired no title to the offices by virtue of the first vote.

In the instant case no private rights have intervened since the passage of the Department of Urban Renewal resolutions which would support a

claim that the Department is estopped to rescind its action. The bidders were on notice that they acquired no vested rights to purchase the land until such time as their offers were formally accepted by the Department and the sales approved by the City Council and the Urban Renewal Administration. None of these actions has been taken. Nor can the bidders named in the resolutions claim any vested rights by reason of being the highest bidders, since the statute does not require competitive bidding and the instructions clearly stated that the awards would not be made on the basis of price alone.

On the question of personal liability of the members of the Department, it is elementary that a municipal officer is not liable to private suit for his acts done with care in the honest performance of his corporate or governmental duties. McQuillin, *Municipal Corporations*, 3rd Ed., § 12.222, states:

"Members of a municipal legislative body are not liable for damages consequent upon the passage of an ordinance in good faith which they have authority to pass. Even voting in good faith for an ordinance or resolution void by reason of a statutory limitation on the power of the council, it has been held, does not create personal liability, since the act in any event is legislative in its nature. That legislative officers are not personally liable for their legislative acts is so elementary, so fundamentally sound, and has been so universally accepted, that but few cases can be found where the doctrine has been questioned and judicially declared. Nor ordinarily can the motives of a legislative body, state or municipal, be inquired into in passing legislation, e.g. an ordinance. Municipal legislative officers while acting in their capacity are acting on behalf of the public; their acts represent the public will and their duty is solely to the public. They are not liable for an injury to an individual resulting from their acts done in good faith as officers of the public, even though such acts are wholly without authority of law and are void for that reason."

To the same effect, see *Nelson v. Knox*, 256 F. 2d 312; *Martelli v. Pollock*, 328 F. 2d 795; *McCray v. City of Lake Louisville*, 332 S. W. 2d 837.

The determination of who may purchase redevelopment project land is a power delegated by the legislature to the members of the Department of Urban Renewal, to be exercised in accordance with the standards set forth in the statute. The actions of the Department in adopting the aforesaid resolutions and its proposed action to rescind are clearly legislative acts which, in our judgment, confer an immunity from personal liability.

STORAGE OF FLAMMABLE LIQUIDS

(City Collector—E. W. P.—April 22, 1964)

We have your recent letter advising that Hon. Francis J. Murphy, Division Marshal in Charge, Bureau of Fire Prevention, has directed your attention to the fuel, oil, gasoline and other flammable materials stored and used in the construction of buildings by Chicago Housing Authority at 3146 S. Wentworth Avenue and 3216 S. Wentworth Avenue, Chicago, Illinois. Two questions are propounded, as follows:

1. Are contractors and builders required to apply for and obtain a City of Chicago Storage of Flammable Liquids License in accordance with the provisions of Section 129.1-1 of the Code for flammable liquids stored and used on building sites while engaged in the building construction?

2. Specifically are the contractors and builders of the two high-rise buildings under construction for the Chicago Housing Authority at 3146 South Wentworth Avenue and 3216 South Wentworth Avenue subject to the license provisions of Section 129.1-1 of the Code?

The fundamental reason for requiring a flammable liquids license under Chapter 129.1 of the Municipal Code is to enable the City of Chicago to assure itself that the storage and use of flammable liquid is done in a proper manner and does not constitute a danger to the public. This most cogently outlines the necessity for compliance with Section 129.1 by the owners of these two buildings and any others under construction where the said liquids are stored and/or used.

Chicago Housing Authority is given no police power covering the construction of buildings, the prevention of fires, the making safe of dangerous constructions. The legislature by statute in this State has conferred on municipal corporations, such as cities, villages and incorporated towns, and counties, the police power to prescribe fire regulations and to regulate buildings within their limits in respect to fire protection and it is our opinion that this power may be exercised over territory controlled by another municipal corporation.

VARIANCE IN USE OF FUNDS

(City Comptroller—R. L. C.—February 7, 1966)

The Corporation Counsel is in receipt of your letter of January 31, 1966, wherein you ask if the recent \$1,000,000 transfer from the Chicago Housing Authority corporate fund to the City of Chicago special deposit fund No. 648 may be applied to cancel a note of the Chicago Housing Authority which you are now holding and which arose out of a \$1,000,000 advance or loan made by the City to Chicago Housing Authority in December of 1945.

On October 27, 1965, Mr. Charles R. Swibel, Chairman of the Chicago Housing Authority, forwarded a check in the amount of \$1,000,000 to Mayor Richard J. Daley, together with C. H. A. resolution No. 65-CHA-158 of October 14, 1965, authorizing such transfer. The resolution specifically cites the source of said funds and the fact that the same are "general corporate funds of the Authority". The resolution acknowledges the latitude granted by Section 8.2 of the Housing Authority Act (Chap. 67½, Ill. Rev. Stat. 1965) "to utilize any and all of its powers to assist the City in any manner which will tend to further the objectives of the Housing Authority's Act" and further makes the finding that

"it would be in the best interest of the Authority and the City of Chicago that \$1,000,000 of said general corporate funds be utilized for the acquisition and clearance of slum or blighted property in the City which is predominantly residential in character or changes to be developed or redeveloped for predominantly residential purposes . . ."

Nowhere in said resolution is there any reference or expression of intent to effect a discharge of the \$1,000,000 note which evidences the advance or loan made by the City to the Chicago Housing Authority in December of 1945 for emergency housing accommodations of World War II Veterans. The clear and unambiguous terms of the resolution specifically preclude such an interpretation.

In light of the specific terms under which the October 1965 transfer was made

"on the condition that the City, in accepting said funds, undertakes to utilize said funds solely for the purpose of acquiring and/or clearing slum and blighted areas which are predominantly residential in character, or which are to be redeveloped for predominantly residential purposes . . ."

the City should exercise all care to insure that none of its acts in relation thereto are susceptible to an interpretation at variance therewith. The application of these funds to discharge an obligation which appears uncollectible might carry with it such an implication and should be avoided.

RELOCATION OF URBAN RENEWAL FUNDS

(Commissioner, Department of Urban Renewal—T. A. F.—March 10, 1966)

Relative to your request for an opinion as to whether the Department of Urban Renewal should elect to make relocation payments in excess of \$25,000.00, the following is submitted.

It is a condition of the increased relocation payment provision that the Local Public Agency pay from its funds, one-fourth or one-third of the excess over \$25,000.00 (§ 3.109 (2) (ii) and (iii); 30 F. R. 10027, Aug. 12, 1965). It is required under the regulations that documentation be submitted setting forth that the Local Public Agency has, or will have available, local funds, the source thereof, and opinion of counsel that legal authority exists to pay such share. (Local Public Agency Letter No. 339.)

It has long been the law of Illinois that relocation expenses incident to property acquisition are non-compensable (*Housing Authority v. Kosydor*, 17 Ill. 2d 602 (1959)). In the absence of special legislation authorizing same, they cannot legally be paid. There is no legislation in Illinois authorizing payment of relocation expense. Accordingly, local funds are not and could not be made available for such payment and, needless to say, it cannot be stated that legal authority exists for the payment of such expense or any portion thereof.

It is, therefore, the opinion of this office that the Department of Urban Renewal cannot elect to make relocation payments in excess of \$25,000.00 under the conditions set forth in 30 F. R. 10027 Sec. 3.109 (2) (ii) and (iii) and Local Public Agency Letter No. 339.

CHAPTER V—REGULATION OF PUBLIC HEALTH, SAFETY AND WELFARE

Section A. FOODS AND DAIRY PRODUCTS

REGULATION OF FROZEN DESSERT PRODUCTS

(Commissioner of Health—M. C. H.—April 30, 1962)

This is to acknowledge the receipt of your letter to this office in which inquiry is made whether or not the Bresler Ice Cream Company may be permitted:

1. "to screen off Grade 'A' Chicago inspected and approved dairy products in hardening room from non-approved dairy products area."
2. "pasteurized non-approved products at the end of the working day or on separate days."
3. "Arrange for separate tank space for new un-approved dairy products and properly identify and mark containers to differentiate between the approved for Chicago sale ice cream and mix, and the non-approved which is for sale outside of the City of Chicago."

and will such operations constitute a violation of Chapter 139 or Chapter 154 of the City Code.

Please be advised that Section 139-3 provides:

"* * * The Board of Health shall make, or cause to be made, an investigation of the premises described in such application, for the purpose of determining the fitness and suitability of said premises for the conduct of such business from a sanitary standpoint, and as to whether the applicant has complied with the state laws and provisions of this code regulating health and sanitation so as properly to safeguard and insure the *purity of the products* to be made or manufactured in such establishment." (Italics supplied.)

Section 139-8, among other things, provides as follows:

"No decayed, decaying, *unwholesome or impure material of any kind whatsoever* shall be used in the manufacturing of *any* product made in such ice cream factory. * * *" (Italics supplied.)

Section 154-2 provides as follows:

"No person shall sell, offer for sale, expose for sale, dispose of, exchange or deliver or with the intent so to do, have in his *possession, care, custody, or control* milk or milk products for human food without having obtained a license for that purpose from the City." (Italics supplied.)

Please note that the Board of Health will not approve the milk products intended to be manufactured by the Bresler Ice Cream Company, therefore no license will issue.

It appears from the provisions above quoted that there is sufficient language in the City Code which prohibits the utilization of the facilities for the manufacture of inspected, approved ice cream products and the manufacturing

of ice cream products from non-approved ingredients or materials even though the products so manufactured from unapproved materials will not be sold within the City limits.

The provisions in said Code against the possession of unwholesome or impure materials on said premises where ice cream is manufactured to be sold within the City limits is very significant in that it is a safeguard against the manufacturing of any dairy products not approved by the Board of Health on the premises where the approved products are being stored.

It is our opinion that the Board of Health, by strict enforcement of these provisions, can insure the wholesomeness and purity of materials which are being used for the manufacture of the products in said ice cream factory.

FOOD DISPENSER'S LICENSE IN UNIVERSITY OF CHICAGO BOOKSTORE

*(Zoning Administration, Department of Buildings — E. W. P.—
March 23, 1964)*

We have your letter dated March 3, 1964 in which you enclosed copy of letter from the University of Chicago relating to license for food dispensing in their existing book store located in an R-5 Residence District.

In the attached letter Mr. Raymond W. Busch, Office of Legal Counsel, The University of Chicago, directs our attention to the opinion of the Corporation Counsel of February 10, 1953. He stated in that opinion that although Chapter 130 of the Municipal Code of the City of Chicago grants an exemption to charitable, religious, or educational institutions, such as the University, from the payment of the food dispenser's license fee usually charged by the City, it does not exempt such institutions from the requirement of securing such a license, if the institution sells at retail any cooked or uncooked article of food for consumption on the premises, even though such sale of food is limited to the University's students and employees and not made to the public.

You advise in your letter that the dispensing of food is not a permissible use in an R-5 Residential District. However, in view of the fact that the application is made by a University now established in this district for its snack bar located in the book store of the University at 5802 Ellis Avenue, you request our opinion as to your procedure in the matter of processing this application.

Public restaurants or other similar types of commercial food establishments are not permitted uses in an R-5 zoned district, but a University is a permitted use in this zone and the maintenance of dining halls, cafeterias and snack bars for the use of the students and employees is a proper University use.

It is therefore our opinion that the application should be approved for zoning and in other necessary respects and that a food dispenser's license should be issued to the University of Chicago, exempt from fee.

FOOD DISPENSER'S LICENSE IN SHOE-SHINE PARLOR

(A. T. T.—M. C. H.—October 2, 1964)

This is in reply to your recent letter to His Honor Mayor Richard J. Daley, regarding the Chicago Board of Health's disapproval of an application for a Purveyor I Food License made by Mr. Matthew Wigley, 8 West 59th Street, who wishes to sell foodstuffs from his shoe shine parlor at the above-mentioned address. You also state that you are desirous of knowing the laws pertaining to billiard halls having food concessions and/or shoe shine parlors, together with the dates of the passing of such ordinances in the city of Chicago.

Kindly be informed that billiard halls and shoe shine parlors are not licensed by the Chicago Board of Health. Food establishments, however, do come within the jurisdiction of this department. Mr. Wigley made application for a Purveyor I license for food to be dispensed in his shoe shine parlor. The license application was disapproved because, according to Board of Health rules and regulations, the selling of food from a shoe shine stand or parlor is incompatible for the following reasons:

1. All persons who handle food shall wear garments which are clean and of a washable character or nature and used for that purpose only.
2. The hands of all persons shall be kept clean while such persons are engaged in the handling of food.
3. Before any license shall be issued, the Board of Health shall cause an inspection to be made of the premises as a food purveyor, the equipment contained therein, the employees intended for the same, and all other matters relating to the business which it considers necessary to investigate from a health or sanitary standpoint.

In the operation of a shoe shine stand, the operator's hands and clothing are constantly in a dirty condition due to the nature of his work. Polish and other toxic materials used can be transferred to the food from the hands of the shoe shine operator. For these reasons all persons operating a shoe shine stand who make application for the selling of food are disapproved, unless a physically separated facility with personnel other than those engaged in shoe cleaning is provided.

You also state that you found many shoe shine parlors without partitions having food concessions where the proprietor had been licensed.

In accordance with your request, an inspection was made of each of the establishments you mentioned. These are listed below with the reports of the inspections.

1226 East 79th Street—Shoe shine parlor, serving candy, without any partition and operating with a license.

Our report indicates that this is a wrong address. This is a vacant lot. No such operation in the neighborhood.

10356 Ewing Avenue—Shoe shine parlor selling food without any partition and with a license.

Our report indicates that the complaint is totally unjustified. There is no shoe shine parlor at this address. Premises are properly licensed for the sale of food.

300 East 43rd Street—Elevated station. A combination billiard hall, shoe shine parlor, and cafeteria. All are operating without any partition and with a license.

Our report indicates no such location at 300 East 43rd Street. However, 317 East 43rd Street is a licensed food dispenser establishment having a shoe shine parlor partitioned from the food section. The report further indicates that a shoe shine operator does not sell or handle food.

730 West 69th Street—Shoe shine parlor selling food with a license and no partition.

Our report indicates that this is not a shoe shine parlor but is a properly licensed tavern and liquor store.

We trust that the above comprehensive report satisfactorily answers your inquiry.

SIDEWALK FOOD SALES

(Superintendent of Police—M. E. A.—June 17, 1965)

Reference is made to your letter of June 10, 1965, in which you request our opinion as to whether vendors Cafe Brauer and Consolidated Concession are authorized under the Municipal Code of the City of Chicago to sell their products "from the sidewalk on Michigan Avenue in the downtown area." For two reasons these vendors are not so authorized.

First, the area in which you assert the sales take place is prohibited as to such activities. Section 36-49.1 of the Municipal Code of Chicago provides in part as follows:

"No person shall sell, offer or expose for sale, or solicit any person to purchase any article whatsoever, except daily newspapers, or on any public way or other public place within the districts *heretofore* or hereafter designated by the city council . . ." (Emphasis added).

Section 36-49.1 (as quoted above) was passed by the City Council on December 21, 1939. At such time "a district *heretofore* . . . designated by the city council" as a prohibited area was "the district bounded on the north by the Chicago River, on the south by the South line of Roosevelt, on the east by Lake Michigan and on the west by the Chicago River." The designation of this district is on file in the office of the City Clerk. Therefore, under the existing ordinance vendors such as Consolidated Concessions and Cafe Brauer are prohibited from selling their products "from the sidewalks on Michigan Avenue in the downtown area."

Secondly, Mr. Larry Gross, of the License Enforcement Division of the office of the City Clerk, has informed us that Cafe Brauer and Consolidated Concessions have failed to obtain the appropriate city licenses for the sale of their products. For this added reason, the sales activities of these vendors as described by you are in violation of the Municipal Code of the City of Chicago.

Accordingly, it is our opinion that notwithstanding any purported authorization of the Chicago Park District the actions of these vendors as described by you are unlawful.

Section B. WEAPONS

REGULATION FOR SALE OF WEAPONS

(Superintendent of Police—W. J. K.—June 11, 1962)

Your communication requesting an opinion as to the sale of tear gas pens and tear gas cartridges in the City of Chicago, and attached thereto a letter from an attorney representing Sports, Inc., with several brochures describing, depicting and advertising tear gas cartridges and pens; further, under separate cover, a kit with three different size pens and cartridges has been submitted to the undersigned.

The attorney's letter refers to paragraphs 152A and 153 of Chapter 38, Ill. Rev. Stat. of 1959, to-wit:

"152a. Carrying or possessing tear gas gun, projector or bomb, etc. prohibited—Exceptions. § 1-A. No person, except a duly appointed or elected law enforcement officer, member of the Army, Navy or Marine Corps of the United States, or of the National Guard, or organized reserves, in pursuance of his official duty, or employee or agent of a bank, trust company, express company, railroad company or of a commercial institution, in pursuance of, and while engaged in the discharge of the duties of his or her employment, shall possess or carry on or about his or her person, or in any vehicle a tear gas gun, projector or bomb or any object containing noxious liquid gas or substance."

"153. Register of sales by dealer. § -2. All persons dealing in firearms of a size which may be concealed upon the person, at retail, within this State, shall keep a register of all such weapons sold or given away by them. Such register shall contain the date of the sale or gift, the name, address, age and occupation of the person to whom the weapon is sold or given, the price of the said weapon, the kind, description and number of the weapon and the purpose for which it is purchased or obtained."

Reference is also made in said letter to Chapter 183 of the Municipal Code of Chicago, Sections 1 through 10.

"Deadly Weapons"

"183-1. It shall be unlawful for any person to engage in the business of selling, or to sell or give away, any pistol, revolver, dagger, stiletto, billie, derringer, bowie knife, dirk, or other deadly weapon which can be concealed on the person, without securing a license so to do."

"183-2. An application for said license shall be made in conformity with the general requirements of this code relating to applications for licenses. The commissioner of police shall approve said application before a license shall be issued."

Sections 183-3, 5, 6, 7 and 8 are regulatory as to the sale of weapons and under supervision of the Police Department.

The tear gas pen involved is a "Hercules Tear Gas Fountain Pen." In shape, size and general appearance it appears to be that of a large fountain pen.

A powerful tear gas cartridge or shell (38 calibre and also shells of larger calibre) is in the barrel of the simulated pen; to fire or explode the cartridge or shell, a brass knob in a slot is pulled or pushed back with the thumb and then released, resulting in the firing-pin hitting the shell in the same manner as a shell is exploded in a revolver or pistol; tear gas is projected from this device forward for a number of feet with a spread of about five or six feet.

Several opinions have been written by this office in the past and appear in "Opinions of the Corporation Counsel" in Vol. XVIII, p. 434, year 1930; Vol. XXII, p. 243, year 1947 and Vol. XXIII, p. 356, year 1949. These opinions were written and based on the State Statutes and City Ordinances then in existence as more fully recited heretofore in the preceding paragraphs. Under the State Statutes prior to January 1, 1962, certain classes were permitted to possess or carry tear gas pens. Chapter 183 of the Municipal Code was applicable to the sale of said device but only upon licensed premises and under supervision of the Police Department as provided for in said Chapter 183 of the Municipal Code.

However, the legislature of the State of Illinois, at its regular session in 1961, repealed paragraphs 152A and 153 of Chapter 38, Ill. Rev. Stat. and passed the following statutes relating to the subject matter herein, to take effect as of January 2, 1962, recited *haec verba* :

"Article 24. Deadly Weapons"

"24-1. § 24-1. Unlawful Use of Weapons. (a) A person commits the offense of unlawful use of weapons when he knowingly :

- (1) Sells, manufactures, purchases, possesses or carries any bludgeon, black-jack, slingshot, sand-club, sand-bag, shotgun with a barrel less than 18 inches in length, metal knuckles or any knife, commonly referred to as a switchblade knife, which has a blade that opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife; or . . .
- (3) Carries on or about his person or in any vehicle, a tear gas gun projector or bomb or any object containing noxious liquid gas or substance; or
- (4) Carries concealed in any vehicle or concealed on or about his person except when on his land or in his own abode or fixed place of business any pistol, revolver or other firearm."

"(b) Penalty.

A person convicted of a violation of Subsection 24-1 (a) (1) through (6) shall be fined not to exceed \$500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both; a person convicted of a violation of Subsection 24-1 (a) (7) shall be imprisoned in the penitentiary from one to 5 years. A person convicted of a felony under the laws of this or any other jurisdiction, who, within 5 years of release from penitentiary or within 5 years of conviction if penitentiary sentence has not been imposed, violates any Subsection of this Section shall be imprisoned in the penitentiary from one to 10 years."

Further, under Article 24-2 of Chapter 38 of the Ill. Rev. Stat., entitled "Exemption" which law became effective as of January 2, 1962, the following appears, to-wit :

"24-2 § 24-2 Exemptions. (a) Subsections 24-1 (a) (3) and 24-1

(a) (4) shall not apply to or affect any of the following :

- (1) Peace officers or any person summoned by any such officers to assist in making arrests or preserving the peace while he is actually engaged in assisting such officer.
- (2) Warden, superintendents and keepers of prisons, penitentiaries, jails, and other institutions for the detention of persons accused or convicted of an offense.
- (3) Members of the Armed Services or Reserve Forces of the United States or the Illinois National Guard or the Reserve Officers Training Corps, while in the performance of their official duty.
- (4) Watchmen while actually engaged in the performance of the duties of their employment.
- (5) Manufacture, transportation, or sale of weapons to persons authorized under (1) through (4) of this Subsection to possess such."

The State Legislature saw fit to classify tear gas pens in the category of "Deadly Weapons" and has restricted by virtue thereof, the sale of the same to certain classes so that the sale of a tear gas pen in the City of Chicago, comes within the purview of Chapter 183, Sections 1 to 10 of the Municipal Code, thus restricting the sale in the City by only persons who are duly licensed and supervised by the Police Department, and can only be sold to those persons or classes as are exempt by Article 24-2, etc.

Returned under separate cover, are the brochures and kit with three tear gas pens and cartridges.

TEAR GAS PROTECTION

(Superintendent of Police—W. J. K.—June 13, 1962)

Your request for an opinion as to whether or not a certain promotional sales organization would be within the law to merchandise through regular retail outlets, an item called "Escort", a device in the nature of a tear gas projector; and further, whether its possession constitutes a violation of the laws of this State.

"Escort" is a device that appears to be like a set of bellows with a spout on one end. The contents contained therein is a chemical colored solution and is released by holding the same in the palm of the hand, letting the spout extend between the fingers; a cap is removed, and aimed at one's face, and the bellows squeezed, releasing the liquid into the face of an assailant, temporarily blinds him . . . leaves him helpless . . . painful, the blinding effect is only temporary . . . the "Escort" solution leaves a tell-tale stain where the solution contacts the skin. It cannot be washed away for several weeks . . . however, it will wear off. Keep Hanlon's "Escort" handy at all times . . . fits easily in your purse . . . protection in the home . . . car's glove compartment . . . your place of business."

The State Legislature of the State of Illinois, in its regular session of 1961, passed a law which went into effect on January 2, 1962—Article 24. Deadly Weapons of Chapter 38 now contained in the Ill. Rev. Stat. of 1961, to-wit:

"Article 24. Deadly Weapons"

". . . , or

- (3) Carries on or about his person or in any vehicle, a tear gas gun projector or bomb or any object containing noxious liquid gas or substance; or
- (4) Carries concealed in any vehicle or concealed on or about his person except when on his land or in his own abode or fixed place of business any pistol, revolver or other firearm."

"(b) Penalty.

A person convicted of a violation of Subsection 24-1 (a) (1) through (6) shall be fined not to exceed \$500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both; a person convicted of a violation of Subsection 24-1 (a) (7) shall be imprisoned in the penitentiary from one to 5 years. A person convicted of a felony under the laws of this or any other jurisdiction, who, within 5 years of release from penitentiary or within 5 years of conviction if penitentiary sentence has not been imposed, violates any Subsection of this Section shall be imprisoned in the penitentiary from one to 10 years."

Further, under Article 24-2 of Chapter 38 of the Ill. Rev. Stat., entitled "Exemption" which law became effective as of January 2, 1962, the following appears, to-wit:

- "24-2 § 24-2 Exemptions. (a) Subsections 24-1 (a) (3) and 24-1 (a) (4) shall not apply to or affect any of the following:

- (1) Peace officers or any person summoned by any such officers to assist in making arrests or preserving the peace while he is actually engaged in assisting such officer.
- (2) Warden, superintendents and keepers of prisons, penitentiaries, jails, and other institutions for the detention of persons accused or convicted of an offense.
- (3) Members of the Armed Services or Reserve Forces of the United States or the Illinois National Guard or the Reserve Officers Training Corps, while in the performance of their official duty.
- (4) Watchmen while actually engaged in the performance of the duties of their employment.
- (5) Manufacture, transportation, or sale of weapons to persons authorized under (1) through (4) of this Subsection to possess such."

A tear gas gun projector having been classified by the State Legislature as a deadly weapon, comes within the purview of Chapter 183 of the Municipal Code of Chicago, wherein the sale of deadly weapons by a retail outlet is restricted unless a license is secured to do so.

Therefore, said Chapter authorizes the Police Department of Chicago to regulate and supervise the sale of same.

You are hereby advised that the sale of any tear gas implements or devices is forbidden in the City of Chicago unless compliance is had with Chapter 183, Sections 1 to 10 of the Municipal Code and further, can only be sold to those persons or classes as are exempt by Article 24-2 of Chapter 38 of the Ill. Rev. Stat. of 1961.

Submitted herewith is a copy of a letter forwarded to this office by you.

DETECTIVES CARRYING WEAPONS

(Superintendent of Police—J. O. T.—September 17, 1962)

We have your letter of August 17, 1962 in which you requested an opinion as to whether :

1. "All private detectives licensed by the state are authorized to carry weapons (specifically those described in Subsections 24-1(a)(3) and 24-1(a)(4)."
2. "All employees of private detective agencies licensed by the state are so authorized."
3. "Private detectives or employees of private detective agencies licensed by the state are authorized to carry weapons while actually engaged in the performance of duties as watchmen."

* Ill. Rev. Stat. 1961, ch. 38, § 24-1 provides as follows :

§ 24-1 Unlawful Use of Weapons.

(a) A person commits the offense of unlawful use of weapons when he knowingly :

(3) Carries on or about his person or in any vehicle a tear gas gun, projector or bomb or any object containing noxious liquid gas or substance ; or

(4) Carries concealed in any vehicle or concealed on or about his person except when on his land or in his own abode or fixed place of business any pistol, revolver or other firearm . . .

4. "... private detectives or watchmen" have the right "to carry weapons in going to and returning from their place of employment."

5. "... a private detective licensed by the state or an employee of a private detective agency licensed by the state must also procure a license from the city under ..." either Chapter 117 or Chapter 173 of the Municipal Code of Chicago.**

1 and 2. All private detectives licensed by the state are not authorized to carry weapons of the type described in § 24-1 (a) (3) and (4). Private detectives or their employees under certain circumstances, may carry the weapons referred to in the above subsections. Such circumstances are set out in § 24-2 of the Criminal Code, which among others, exempts from the prohibition of § 24-1 the following classes: "(1) Peace officers ... (4) Watchmen while actually engaged in the performance of the duties of their employment", and further permits the transportation of firearms when they are "... broken down in a non-functioning state or not immediately accessible." Although no special exemption is given state licensed detectives or their employees, they may of course on occasions fit under any of the above three exempted categories. When they do, they are exempted from the prohibitions against carrying the weapons described in § 24-1 of the Criminal Code.

3. Private detectives in general have no greater nor lesser right than any other citizens when it comes to carrying weapons. None of the following Illinois statutes or ordinances of the City of Chicago make any distinction between the two classes.

Chap. 38 § 24 (Deadly Weapons) 1961 Criminal Code.

Chap. 38 § 155 et seq. (Concealed Weapons) 1959 Criminal Code.

Chap. 38 § 608a et seq. (Detectives and Investigators).

Municipal Code of Chicago :

§ 117 (Private Detectives and Detective Agencies)

§ 173 (Special Policemen)

§ 183 (Deadly Weapons)

§ 193-30 (Carrying dangerous weapons)

The conclusion therefore, is that unless such private detective or employee thereof, is a peace officer or a watchman, "... actually engaged in the performance of his duties of ... employment", he cannot carry a firearm concealed on his person or concealed in his vehicle.

4. The preceding conclusion applies to private detectives or their employees while going to or returning from their place of employment. There is, however, according to § 24-2 of the Criminal Code, no prohibition against the "... transportation of weapons broken down in a non-functioning state or not immediately accessible."

No conflict exists with Opinion N.11799, Volume 24, Opinions of the Corporation Counsel wherein it was stated, in response to an inquiry of the Commissioner of Police, that it is

"... permissible for special policemen employed by common carriers within the City of Chicago to carry their firearms from their place of employment to their homes and return, in view of the nature of the duties for which they are engaged which may call them from their homes to different places on immediate notice ... However, since every special policeman in the City of Chicago is subject to 'such additional rules and regulations as the commissioner of police may make concerning special policemen' (Section 173-11 of the Municipal Code), it would appear to be within your power to make a determination of this question as a matter of policy. If you should decide not to permit this

** Chapter 117 regulates private detectives and detective agencies. Chapter 173 regulates special policemen.

practice, special policemen violating such a rule would not be guilty of violating the concealed weapons statute and ordinance but rather of violating a rule of the commissioner of police. On the other hand if you feel that as a matter of policy you should permit such special policemen, because of the nature of their duties or the limited possibility of storing weapons, to carry weapons to and from work, you are free to do so without countenancing any violation of law."

The foregoing opinion concerned Special Policemen who according to Section 173-11 of the Municipal Code of Chicago "... possess all the powers of the regular police patrol at the places for which they are respectively appointed or in the line of duty for which they are engaged. . . ."

The Criminal Code's prohibition against carrying on one's person or in a vehicle a tear gas projector (§ 24-1) and the prohibition against carrying concealed on or about one's person or concealed in a vehicle are not applicable to peace officers (§ 24-2(a)(1)). The Criminal Code § 2-13 defines Peace Officers as "any person who by virtue of his office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses whether that duty extends to all offenses or is limited to specific offenses." Special Policemen would be encompassed in the term peace officers unless otherwise limited by the Superintendent who has such authority as is cited in the above opinion.

5. Ill. Rev. Stat. 1961, Section 11-42-1 provides that: "The corporate authorities of each municipality may license, tax, and regulate . . . private detectives . . . detective agencies . . ." Therefore, even though the State of Illinois licenses and regulates Detectives and Detective Agencies under the provisions of Ill. Rev. Stat. 1961, ch. 38 Section 608a-608a, a private detective or a private detective agency must procure a license under the provisions of Chapter 117 of the Municipal Code of Chicago, Section 117-1 of the Municipal Code provides, however, that it "... shall not be construed to require a person who is employed or seeks employment exclusively by a licensed detective agency to obtain such a license."

In response to your last inquiry as to whether or not a private detective or detective agency licensed by the state or an employee thereof must also procure a license under Chapter 173-1 of the Municipal Code of Chicago in addition to a license under Chapter 117, or in lieu thereof, the answer is that it would vary with the applicant. To function as a private detective, an applicant must be licensed under the provisions of Chapter 117. If such applicant also desired to be a special policeman, Chapter 173 must be followed. A reading of the latter Chapter would indicate that the Chapter contemplates applicants will be natural persons.

REGULATIONS GOVERNING AIR RIFLES

(Attorney-at-Law—W. J. K.—November 18, 1963)

Your letter of recent date states that you represent a settlement house in Chicago, a not-for-profit corporation, which is contemplating conducting fully supervised weekly classes for boys, ages 10 to 14 years. Only air rifles will be used; classes will be held indoors in an adequately lit area with ample safety precautions and a nominal fee will be charged for participation.

You request an opinion and an answer to the following questions, to-wit :

(1) Is the settlement house exempt from licensing requirements for gun clubs of sections 170-1 through 170-5 because of non-use of firearms?

(2) Is a permit for purchase required pursuant to sections 183-14 and 183-15 where the purchase took place outside the City of Chicago but the use will take place within the city limits?

(3) In view of the exclusive use of the air rifles on private property under full supervision, may the contemplated classes in marksmanship training include discharge of air rifles?

Your description of this activity is definitely in the category of a rifle range and is subject to compliance with Chapter 170 of the Municipal Code of Chicago. Section 170-1 reads as follows:

"No person shall conduct or operate any shooting gallery, rifle range, gun club, or other place where firearms are discharged, in the city, without first being licensed so to do."

Answering query No. 1, this operation is not a gun club and the "non-use of firearms" does not exclude a rifle range using air rifles because air rifles are included in our ordinances, Chapter 183, entitled "Weapons", more specifically appearing in Sections 183-10, 183-14 and 183-15 which read as follows:

"183-10. It shall be unlawful for any person to engage in the business of selling, or to sell or give away any air rifle or air gun, or any toy firearms or other toy in the nature of a firearm in which any explosive substance can be used without securing a license so to do, and no person having secured such license shall sell, or give away any such weapon to any person within the city who has not secured a permit from the commissioner of police to purchase such weapon in the manner hereinafter provided; provided, that it shall not be necessary for any person licensed to sell deadly weapons to take out an additional license for the sale of the articles mentioned herein.

"183-14. It shall be unlawful for any person to purchase any air rifle or air gun, or any toy firearm or other toy in the nature of a firearm in which any explosive substance can be used, without first securing from the commissioner of police a permit so to do. Before any such permit is granted, an application in writing shall be made therefor, setting forth in such application, the name, address, age, height, weight, complexion, nationality, and other elements of identification of such person desiring such permit. Such application shall also contain a recommendation from two persons who shall appear to be taxpayers residing within the city that the permit shall issue.

"183-15. It shall be the duty of the Commissioner of police to refuse such permit to any person having been convicted of any crime and any minor. Otherwise, if the applicant is of good moral character, the commissioner of police shall grant such permit upon the payment of a fee of one dollar."

Your second question as to the necessity of a permit where air rifles are purchased outside of the City of Chicago, the following sections of the Municipal Code, 183-14, 183-15 (heretofore cited), 190-7, 190-11, 193-29 (first paragraph), and 193-31, are cited *haec verba*, to-wit:

"190-7. No person shall sell, loan or furnish to any minor any gun, pistol, or other firearm, or any toy gun, toy pistol, or other toy firearm in which any explosive substance can be used, within the city; except that minors may be permitted, with the consent of their parents or guardians, to use firearms on the premises of a duly licensed shooting gallery, gun club, or rifle club or to shoot game birds in accordance with the provisions of section 190-11 (193-32) of this code.

"190-11. Any person who shall violate any of the provisions of this chapter for which no other penalty is provided shall be fined not

less than five dollars nor more than one hundred dollars for each offense.

"193-29. No person shall fire or discharge any gun, pistol, or other firearm within the city, except upon premises used by a duly licensed shooting gallery, gun club, or rifle club, or in accordance with the provisions of section 193-32 of this code. . . .

"193-31. No person shall at any time discharge or set off anywhere within the city, or have in his possession for such purpose any toy firearm, air rifle, toy cannon, or any gun that discharges projectiles either by air, spring, explosive, substance, or any other force."

so that in view of the ordinances hereinabove cited, it would necessitate obtaining a permit for the purchase of air rifles, irregardless of where they are purchased.

Answering your third question, the answer is "Yes", providing compliance has been had as required by Chapter 170 of the Code and other ordinances cited herein.

REGULATIONS APPLICABLE TO HAND GUNS

(T. P. B.—W. J. K.—February 4, 1964)

In your letter of January 9, 1964, addressed to Supt. O. W. Wilson, you complain about the difficulties of obtaining a permit for the purchase of a "handgun", in which it is claimed by you that the same amounts to a refusal to issue the same. A copy of this letter was sent to Hon. Richard J. Daley, Mayor of the City of Chicago, with a postscript inquiring of the Mayor if he was aware of this situation.

The City Council of the City of Chicago, by virtue of the power given it by the original charter, as amended February 13, 1863, Chapter 12, Section 2, Paragraph 4 (Tuley, Laws and Ordinances of Chicago, 1873, p. 517), quoted herewith:

"To regulate and prevent the use of fire-works and fire-arms.", and which later was amended on March 9, 1867, and enacted as Section 16 of Chapter 5 conferred additional power on our City Council as follows:

"To regulate or prohibit the carrying or wearing by any person under his clothes, or concealed about his person, any pistol, or colt, or slung shot, or cross knuckles, or knuckles of lead, brass, or other metal, or bowie knife, dirk knife, or dirk or dagger, or any other dangerous or deadly weapons, and to provide for the confiscation or sale of such weapons."

then passed Chapter 183 of the Municipal Code of Chicago entitled "Weapons", specifically Section 183-7, to-wit:

"183-7. It shall be unlawful for any person to purchase any deadly weapon mentioned in section 183-1, which can be concealed on the person without first securing from the commissioner of police a permit to do so. Before any such permit is granted, an application in writing shall be made therefor, setting forth in such application the name, address, age, height, weight, complexion, nationality, and other elements of identification of the person desiring such permit, and the applicant shall present such evidence of good character as the commissioner of police at his discretion may require.

It shall be the duty of the commissioner of police to refuse such permit to any person having been convicted of any crime, and

any minor. Otherwise, in case he shall be satisfied that the applicant is of good moral character, it shall be the duty of the commissioner of police to grant such permit upon the payment of a fee of two dollars."

Our State Supreme Court, in a test as to the constitutionality of this chapter, that is, the power of the City Council to pass this legislation to regulate or prohibit, said as follows:

"The City of Chicago has express power to regulate or prohibit sale of deadly weapons. Section 16 of the original charter of the city of Chicago, as amended, not being inconsistent with any provisions of the general Cities and Villages act, is still in force, and confers upon the city express power to regulate or prohibit the carrying, wearing or concealing of dangerous and deadly weapons and the sale of the same."

Further, our Supreme Court stated:

"The sale or the advertising for sale of deadly weapons may be regulated or prohibited by municipalities under the police power granted by the general Cities and Villages act without violating the provision of the constitution of the United States concerning the right of the people to bear arms for their defense and security."

This has all been determined by our Courts because of public safety and welfare, and it is the opinion of this office that the enforcement and administration of Section 183-7 by Supt. O. W. Wilson and/or his authorized agents is being done within their sound discretion.

PLASTIC-TYPE PELLET GUNS

(Superintendent of Police—W. K.—September 14, 1964)

A letter addressed to you from the North Boundary Homeowners League, wherein it is stated that several complaints from citizens in that vicinity regarding the sale and use of guns which fire small plastic pellets about the size of pearls; that older children while riding bicycles around the neighborhood are firing pellets from these plastic guns at small children: fear is expressed that these pellets may cause injury to eyes of youngsters: that these guns and pellets are sold at neighborhood stores in the vicinity: that the supplier is the A. C. McClurg Company.

Accompanied with said letter, there is submitted the gun, plastic pellets and brochure. The gun simulates a small automatic pistol which is made of plastic; which has spring action; a chamber into which a number of these plastic pellets are inserted. The said pellets are much larger than a BB shot, or about the size of a pearl. A number of pellets are inserted into the "shot chamber" of the gun, thus making it ready for use.

The brochure names the subject gun as "Sekiden Automatic Sap. 50" and states that "hit a ping pong ball at 10 feet"; "can shoot 100 shots without reloading"; "in case it hits a person, it is harmless."

After loading said gun, it is aimed at an object and the trigger is pulled and the head of the spring ejects a "pellet" or "shot."

The gun was put through several tests in this office:

1. At about two feet, then five feet a pellet was expelled at each instance into the palm of the hand, which caused a stinging sensation.

2. At about seven feet distance at an ordinary plate glass window, several pellets were shot out of said gun; the first one broke into several pieces, the other two, after contact with the plate glass bounced back past the individual shooting.

3. A piece of foolscap paper was held at three feet distance from the gun, the trigger pulled and a pellet or shot struck said paper and did not go through same but caused a very minor or slight tear. This test was tried several times and in each instance an impression was made on said paper.

The youngsters possessing this gun and in play, come in exceptionally close contact and in the opinion of this writer could cause injury to the eye.

Section 193.31 of the Municipal Code of Chicago cited haec verba to-wit:

"No person shall at any time discharge or set off anywhere within the city, or have in his possession for such purpose any toy firearm, air rifle, toy cannon, or any gun that discharges projectiles either by air, spring, explosive, substance, or any other force."

and Section 195.32 of the Municipal Code provides among other things:

"Any person violating any of the provisions of this section shall be fined not less than \$10.00 nor more than \$25.00 for each offense."

Section 193.31 was passed by our City Council for the purpose of protecting public health, safety, comfort and welfare, so that the use of the subject plastic gun is definitely prohibited by City Ordinance.

As to the prohibition of the sale locally of this item, the State Legislature is the only body that has jurisdiction to control same.

P. S. Under separate cover, I am returning herewith the plastic gun, pellets and brochure.

Section C. GAMBLING AND LOTTERIES

"DARTO" GAME

(Superintendent of Police—W. J. K.—September 26, 1961)

Your request for an opinion as to the legality of a game called "Darto", which was found to be operating in a certain police district in the City of Chicago has been turned over to the undersigned for reply.

The operation of the game described in your letter is as follows:

"Darto" consists of a large corrugated board with the letters as follows D-A-R-T-O and below each letter are 15 numerals starting with 1 and ending with 75. The operator * * * throws five darts at the corrugated board * * * numbers are recorded by an assistant operator. * * * players * * * purchased cards for 15¢ * * * or two cards for 25¢. The object of the game is to get any five numbers in a row, diagonally or horizontally or vertically. When the aforementioned is accomplished the player hollers "Darto" and is the winner, after the numbers have been verified * * *. There can be more than one winner of a game, the player can choose a prize from the first shelf, if there are more than one winner, the player chooses the prizes from the second shelf. Prizes consist of Pillows, Laundry Baskets, Lamps and Various Household Items. All of the prizes have a retail value of from \$2.00 to \$6.00."

"Darto" as described above is similar to the old-fashioned "Corn game" or "Bingo", which has all the elements of a lottery or game of chance that is,

1. The "price" to play.
2. A "chance" to win, and
3. A "prize".

The Illinois State Constitution under Section 27, Article IV provides that the General Assembly is prohibited from "authorizing lotteries or gift enterprises" and makes it mandatory on said General Assembly to pass laws prohibiting the same and by virtue of this prohibition, paragraphs 406 and 407 of Chapter 38 of the Criminal Code of the Revised Statutes of the State of Illinois were enacted. Paragraph 407 of Chapter 38 makes it unlawful for the owner or occupant of every house or building, who knowingly permits the setting up, managing, or drawing of a lottery or knowingly suffers money or other property to be raffled for or to be won by a game of chance. Paragraph 407 of Chapter 38 makes it a criminal offense subject to a fine, to set up or promote a lottery for money or by way of a lottery to dispose of any property of value.

Further the State Legislature granted express power to Cities and Villages under Section 23-57 of Chapter 24 of the Cities and Villages Act, Illinois Revised Statutes to suppress gambling, gambling houses, lotteries and all fraudulent devices or practices for the purpose of gambling for money or property. By virtue of this power our City Council enacted Section 191 of the Municipal Code of Chicago, wherein gambling, lotteries, policy games and all schemes of chance are prohibited.

Therefore the use and operation of the game entitled, "Darto" having all the elements of a lottery as heretofore recited is illegal and is in violation of the State Constitution, the existing laws of the State of Illinois and the ordinances of the City of Chicago.

Transmitted herewith is your letter requesting this opinion.

BINGO

(P. A.—L. H. G.—March 10, 1964)

Your letter of March 2, 1964, addressed to Hon. Richard J. Daley, Mayor of the City of Chicago, has been referred to this Department for reply.

There are three branches of government: the Legislative, the Executive, and the Judicial. The Mayor of a city belongs to the Executive Branch and has the duty of complying with the legislative acts and the judicial decisions. Chapter 38 of the Illinois Revised Statutes (1963) at page 1554, under "Definitions", defines a lottery as follows:

"A 'lottery' is any scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win such prizes, whether such scheme or procedure is called a lottery, raffle, gift, sale or some other name."

The word "Bingo", of course, qualifies under the term of "some other name." The same Chapter also provides for fines and punishment for engaging in gambling. The discussion as to whether or not "Bingo" be made a permitted game should be submitted to the Legislative Bureau at Springfield, Illinois, and also to the State Representatives and State Senators in your voting district and those of your classmates.

Section D. OTHER HEALTH AND WELFARE REGULATIONS

TRANSPORTATION OF FLAMMABLE LIQUIDS

(*City Collector—R. N.—February 9, 1961*)

You ask for an opinion from this department as to the applicability of section 172-15 of the Code to fuel oil delivery vehicles owned and operated by bulk plants located beyond the limits of the city of Chicago, garaged and maintained beyond the limits of Chicago, and entering the city only for the purpose of making deliveries, the delivery men engaging in no selling or soliciting of business within the city.

Section 172-15 to which you refer provides, in part: "It shall be unlawful for any person to engage in the business of a fuel oil dealer without first having obtained a license so to do." The delivery in Chicago of merchandise purchased outside of the city cannot be construed as doing business in the city. The power of a municipality to license and regulate occupations extends no farther than the corporate limits of the municipality and may be imposed only upon residents of the municipality, with certain specific exceptions not here involved. In the case of *City of Chicago v. Cuda*, 403 Ill. 381, legality of an ordinance of the City of Chicago which required that fuel sold in load lots by weight and delivered by vehicle within the city must be weighed by a public weighmaster, was assailed. The court held (p. 387): "To our mind it seems clear that the city would have no authority to control sales made outside of the city, * * * as it is thoroughly established that municipal corporations, being creatures of the statute, have no inherent powers, and certainly none that may be exercised beyond the corporate limits of the city, unless especially given by statute. *Higgins v. City of Galesburg*, 401 Ill. 87; *City of Rockford v. Hey*, 366 Ill. 526; *City of Des-plaines v. Boeckenhauer*, 383 Ill. 475.) Therefore, if this ordinance is intended to apply to a buyer and seller, it would not apply to a person who sold outside of the limits of the city of Chicago for delivery within it."

A corporation which establishes and designates its principal place of business as outside of Chicago is not subject to taxes or license fees imposed by the city of Chicago, and the fact that it is necessary that vehicles operated by such firms enter our corporate limits for the sole purpose of making deliveries does not bring them within the purview of the term "engaging in the business" as used in our ordinances.

INTEREST LIMITS ON PAWNBROKERS

(*D. M.—E. W. P.—May 26, 1961*)

Section 159-6 of the Municipal Code provides as follows:

"It shall be unlawful for any pawnbroker to charge or collect a greater benefit or percentage upon money advanced and for the use and forbearance thereof than the rate of three per cent per month; provided, that nothing herein shall be so construed as to conflict with the law pertaining to usury, and the person receiving money so advanced shall not be held to pay any storage, insurance, or charges other than such interest as herein provided.

Every pawnbroker shall at all times have and keep the above paragraph printed in the English language, framed, and posted in a prominent and conspicuous position in his place of business, so that said provision of this code shall be plainly legible and visible to all persons depositing or pledging property with such pawnbrokers."

MISREPRESENTATION OF REAL ESTATE CONDITIONS

(Alderman 7th Ward—R. J. C. & S. R. D.—September 18, 1961)

In response to your letter of May 5, 1961 and your further letter of June 9, 1961, we have considered the proposed legislation relating to misrepresentation of real estate conditions. We have also reviewed the Baltimore ordinance making unlawful certain real estate practices by real estate brokers or salesmen.

There are four principal points involved, viz: (1) has the city statutory authority to enact such legislation; (2) is the prohibited act a nuisance; (3) does the proposed ordinance add anything to powers we already possess; and (4) is the ordinance constitutional. We shall take these points up separately.

Power of city to enact ordinance.

The City of Chicago has only such powers as are expressly delegated to it by the General Assembly or are necessarily implied in order to render a specific power effective. *City of Marquette Heights v. Vrell* (1959), 22 Ill. App. 2d 254, 260. It has no inherent power. Legislation by a municipal corporation is valid only when it is authorized by statute, and statutes granting power to a municipal corporation are construed strictly against the municipality which claims the right to exercise the power. *City of Chicago Heights v. Western Union* (1950), 406 Ill. 428, 433. Any fair or reasonable doubt of the existence of the power is resolved against the municipality which claims the right to exercise it. *The City of Chicago v. Barnett* (1949), 404 Ill. 136, 138.

Bearing such firmly-established legal maxims in mind, we note that the proposed ordinance describes the proscribed conduct as a "nuisance." Section 23-61 of the Revised Cities and Villages Act (Ill. Rev. Stat. 1959, chap. 24, par. 23-61) empowers municipalities "to define, prevent, and abate nuisances." Section 21-20 of the Act (par. 21-20) authorizes the city council of the City of Chicago "to declare and define nuisances and abate the same." Thus, if the prohibited acts are, in fact, nuisances, there is statutory authority for an ordinance declaring and defining them as such and directing their abatement.

Is the subject matter of the proposed ordinance a nuisance?

It has been said that a "nuisance" is "something that is offensive, physically, to the senses and by such offensiveness makes life uncomfortable." *Rosehill Cemetery Co. v. City of Chicago* (1933), 352 Ill. 11, 30. Frequent efforts to state the precise effect of a municipal declaration that a particular thing or activity is a nuisance have proved unsatisfactory. Whatever has been the formula of words used to describe the scope of municipal power, the cases have turned, in the last analysis, upon the court's appraisal of the reasonableness of the municipal action. *The City of Nokomis v. Sullivan* (1958), 14 Ill. 2d 417, 422.

While a city under its general power may define and abate nuisances, it has no power to declare that a nuisance which is not a nuisance in fact. *Dube v. City of Chicago* (1955), 7 Ill. 2d 313, 325; *Rosehill Cemetery Co. v. City of Chicago* (1933), 352 Ill. 11, 29, 30; *The People ex rel. Younger v. City of Chicago* (1917), 280 Ill. 576, 578; *Town of Cortland v. Larson* (1916), 273 Ill.

602, 615, 616; *City of Bushnell v. Chicago, Burlington & Quincy R. R. Co.* (1913), 259 Ill. 391, 395; *City of Chicago v. Weber* (1910), 246 Ill. 304, 308; *City of Streator v. Davenport Packing Co.* (1952), 347 Ill. App. 492, 494, 495.

There is no doubt that municipalities have regulated nuisances successfully for a long period of time. 6 McQuillin, *Municipal Corporations*, 3d Ed. (1949), sec. 24.58-24.92, pp. 567-625. But, the mere fact that the proposed ordinance defines the prohibited conduct as a "nuisance" or as "creating a nuisance" is not necessarily determinative of such issue. We are here attempting to declare that misrepresentation, or deceit, or false statements, constitute a nuisance. This is far removed from any of those things which the courts have heretofore approved as being nuisances.

Does the proposed ordinance add anything to the powers already possessed by the City?

There already exist statutory and ordinance provisions which serve to attain the ends sought by the proposed ordinance. Although the ordinance does not so state, it is evident that real estate brokers, or those in a position to benefit by misleading statements as to changes in neighborhoods, are the persons against whom the ordinance is directed. This conclusion is supported by the alternative reference to the Baltimore ordinance which is solely concerned with real estate brokers or salesmen. Obviously, only those persons, such as brokers, would gain by the prohibited acts.

Under the Criminal Code, public nuisances are misdemeanors punishable by fine and (for a second offense) imprisonment (Ill. Rev. Stat. 1959, chap. 38, pars. 466, 466a, 466b, 467). Also, Section 1 of an Act to prevent fraudulent advertising (Ill. Rev. Stat. 1959, chap. 38, par. 249a) and Section 193-24 of the Municipal Code of Chicago prohibit untrue, misleading or deceptive representations. The latter Act and ordinance accomplish the same ends as the proposed ordinance.

Section 23-91 of the Revised Cities and Villages Act (Ill. Rev. Stat. 1959, chap. 24, par. 23-91) empowers the City of Chicago to regulate real estate brokers and Sections 113-22 to 113-30 of the Municipal Code of Chicago implements this statutory authorization.

Section 8 of an Act in relation to real estate brokers (Ill. Rev. Stat. 1959, chap. 114½, par. 8) prohibits the issuance or renewal of a license to a broker who is deemed guilty of:

"1. Making any substantial misrepresentation, or untruthful advertising, or

"2. Making any false promises of a character likely to influence, persuade, or induce, or

"3. Pursuing a continued and flagrant course of misrepresentation, or the making of false promises through agents or salesmen or advertising or otherwise, or

* * *

"1. Having demonstrated unworthiness or incompetency to act as a real estate broker or salesman in such manner as to safeguard the interests of the public, or

* * *

"14. Any other conduct * * * which constitutes dishonest dealing * * *.

Is the proposed ordinance constitutional?

Although the proposed ordinance seeks its validity from statutory provisions which permit municipalities to regulate nuisances, it is doubtful that the substance of the ordinance is, in fact, a nuisance, for reasons we have discussed above.

It is clear that the ordinance constitutes either (1) a restraint upon speech, or (2) a restraint upon publication, depending upon whether the misrepresentation is oral or written. Misrepresentations cannot be inhibited by ordinance under nuisance powers.

Conclusion

We conclude that the subject matter of the ordinance is not a nuisance.

Furthermore, as we already possess adequate statutory and ordinance powers to effectively combat the conduct spelled out in the ordinance, we are of the opinion that the proposed ordinance is unnecessary.

The Baltimore ordinance is substantially identical with our existing statute relating real estate brokers and salesmen (Ill. Rev. Stat. 1959, chap. 114½, par. 8) so that its enactment by the Council would serve no purpose.

CERTIFICATED DESK CLERK ORDINANCE

(Chief Fire Prevention Engineer—E. W. P.—January 8, 1962)

Relating to our telephone conversation about the application of Section 90-61.1 described as "Certificated Desk Clerk Ordinance" to Laughlin Dormitory on the campus of the University of Chicago.

In an opinion dated December 28, 1955, No. 11991 in Volume 24 of the Opinions of Corporation Counsel, the Hon. John C. Melaniphy, Corporation Counsel of the City of Chicago, in analyzing the ordinance wrote as follows:

"(2) Are dormitories connected with schools, fraternities and other like occupancies included within the terms of the ordinance?"

Answer: In our opinion dormitories connected with schools, fraternities and the like do not come under the terms of the ordinance. They do not constitute a business or occupation where public sleeping accommodations are furnished or maintained."

It is therefore our opinion that the Laughlin Dormitory is not in violation of this particular section and that the item should be stricken.

We are sending a copy of this letter to Mr. Raymond W. Busch, Office of Legal Counsel for the University of Chicago.

NEWSPAPER SOLICITATION

(Superintendent of Police—J. C. M.—January 26, 1962)

We have been informed by the law firm of Kirkland, Ellis, Hodson, Chaffetz & Masters, who represent the Chicago Tribune, that representatives of that paper who have been soliciting subscriptions in the Rogers Park area have been threatened with arrest.

The Supreme Court of Illinois held on January 20, 1961, in the case of *Osborne v. Village of River Forest*, 21 Ill. 2d 237 that municipalities do not have the authority to pass ordinances to regulate persons soliciting subscriptions for newspapers and in that case held an ordinance invalid. Under Section 36-49.1 of the Municipal Code of Chicago, the restrictions on the use

of public ways or solicitation of persons to purchase any article whatsoever exempts the solicitation for the purchase of daily newspapers.

It is our opinion that the City of Chicago and its various agencies do not have authority to interfere with employees of newspapers engaged in the business or occupation of soliciting newspaper subscriptions.

REGULATIONS OF PEDDLERS

(P. R. T.—R. N. April 9, 1962)

In reply to the four questions which you ask, we submit the following:

1. Q. Are peddlers permitted to sell their wares on the streets or in the alleys regardless of whether "No Peddlers Allowed" signs are posted in the area?

A. 160-13. Peddling prohibited in certain districts) No one having a peddler's license shall peddle any merchandise or any other article or thing whatsoever, at any time, within districts which have been or shall be hereafter so designated by the city council*.

2. Q. Are stores permitted to display their wares on the sidewalk in front of their places of business?

A. 34-4. Maintenance of stands) It shall be unlawful for any person to erect, place or maintain in, upon or over public way or other public place in the city, any fruit stand, shoe shining stand, flower stand, vegetable stand, lunch wagon, table, box, bin or any other arrangement or structure for the display or sale of goods, wares or merchandise, or for the pursuit of any occupation whatsoever unless a permit for the same shall be obtained from the superintendent of compensation; provided, that the superintendent of compensation shall issue no such permits except for the purpose of exhibiting for sale daily newspapers, within such districts as are or have been designated by the city council.*

3. Q. Are stores, record shops, etc., permitted to play music, etc., through loudspeakers situated outside of their shops?

A. 99-56. Sundry noises restricted) No person shall make, or cause, permit or allow to be made, upon a public way, or in such close proximity to a public way as to be distinctly and loudly audible upon such public way any noise of any kind by crying, calling or shouting or by means of any whistle, rattle, bell, gong, clapper, hammer, drum, horn, hand organ, mechanically operated piano, other musical instrument, wind instrument, sound amplifier, or similar mechanical device; provided, that the said restrictions shall not apply to any licensed peddler crying or calling for the purpose of advertising goods, wares or merchandise when lawfully using any public alley in the city between the hours of 11 a.m. and 6 p.m.

4. Q. What fence (north, east, etc.) between adjoining property owners is whose responsibility, and the maximum height permitted?

A. (a) Responsibility for construction of dividing line fences on private property is not governed by city ordinance.

(b) Height and construction of fence is regulated section 43-16 and sections 61-5 through 61-5.4, as follows:

43-16. Fences) It shall be unlawful for any person to erect or construct any fence more than five feet in height within the city limits without first obtaining a permit from the commissioner of buildings.

61-5. Fences) Fences shall comply with the provisions of sections 61-5.1 to 61-5.4, inclusive.

61-5.1. Definitions)

(a) A fence is hereby defined as a structure forming a barrier at grade between lots, between a lot and a street or any alley, or between portions of a lot or lots, such structures being independent of any other.

(b) Fences shall be classified according to the general form of their construction as screen fences or solid fences.

(c) A screen fence is a fence so constructed that at least fifty percent of the superficial area thereof consists of regularly distributed apertures.

(d) A solid fence is a fence so constructed that less than fifty percent of the superficial area thereof consists of regularly distributed apertures.

(e) Any fence not constructed entirely of non-combustible material shall be classed as a combustible fence.

61-5.2. Maximum height)

(a) The height of a combustible screen fence shall not exceed eight feet.

(b) The height of a combustible solid fence shall not exceed six feet, except that such fence may have a height not exceeding eight feet under the following conditions:

(1) When the distance from the fence to a public way exceeds the height of the fence.

(2) When such fence is laterally braced on one side with structural braces extending to the top of the fence or is supported by posts of non-combustible material set in masonry or concrete foundations.

(c) The height of a non-combustible screen fence shall not exceed ten feet, except as follows:

(1) A non-combustible screen fence enclosing a place of open air assembly or a yard of an institutional, business, industrial or storage occupancy may have a height not exceeding fifteen feet.

(d) The height of a non-combustible solid fence shall not exceed eight feet except as follows:

(1) A non-combustible solid fence enclosing a place of open air assembly or a yard of an institutional, business, industrial or storage occupancy may have a height not exceeding twelve feet.

61-5.3. Wind load) Fences shall be designed and constructed to resist a horizontal wind pressure of not less than thirty pounds per square foot in addition to all other forces to which they may be subjected.

61-5.4. Barbed Wire) The use of barbed wire at a height less than eight feet above the ground shall be prohibited; provided, however, that the use of barbed wire above six feet from the ground when wholly on or over private property shall be permitted.

REGULATION OF WORKING HOURS

(*M. M. P.—E. W. P.—May 8, 1962*)

Relative to your letter dated April 18, 1962, and our telephone conversation, it is our opinion that the D & R Machine Shop at 2636 W. Huron Street does not have the legal right to work night and day with the machine shop operation. You state that he is working until 4:00 A. M. in the morning.

Section 150-23 of the Municipal Code provides that no machine shop shall be operated between the hours of 8:00 P. M. and 6:00 A. M. in any block in which a majority of the buildings on both sides of the street are used exclusively for residential purposes, or within 100 feet of such block, and that it shall be within the power of the Board of Health, after reasonable notice, to treat such night operation as a public nuisance and to abate the same.

We are sending a copy of this letter to Dr. S. L. Andelman, Commissioner of Health, Board of Health, City of Chicago, for his attention.

“BIG-BANG”

(*C. C.—W. J. K.—June 4, 1962*)

On May 14, 1962, you addressed a letter to this office with enclosed brochures requesting an opinion as to legality of the sale and use in the City of Chicago of “Big-Bang” toy cannon and other models of toy cannons manufactured by your corporation.

Under separate cover this office also received one “Big-Bang” 60 M M cannon with a tube of “Bangsite” or ammunition enclosed therein.

“Big-Bang” is a single shot breech-loading gun (cannon), an ammunition case in the rear end of heavy cast iron body and drag beam . . . mounted on two heavy-duty tractor wheels—Length of cannon body—6 inches, length of muzzle to end beam about 9 inches.

“Bangsite” (ammunition) is a specially prepared calcium carbide preparation supplied in a sealed, air-tight package (tube) to be used in conjunction with “Big-Bang”. A “Warning” is noted on said tube stating that “Bangsite” when put in water, forms a gas and lime and gets hot—so do not put in wet hands, mouth or any moist place, except in the water inside the gun.” On the reverse side of the tube, printed thereon is “Warning—do not put into wet hands, mouth or near the eyes. TO RELIEVE, cleanse with cold water.”

In several of the brochures submitted there is printed: “6 Points for Safest Fun”

1. Not to look into the muzzle of any gun, including “Big-Bang”
2. Never shoot any gun close to the ear—not even “Big-Bang”
3. That “Bangsite” will not explode, etc.
4. “Bangsite”, when wet, changes to gas and lime and gets hot—so never get it in the wet hands, mouth, eyes, or any other moist place except in the water inside the gun.

5. "Bangsite" and the gas formed are not poisonous.

6. "Big-Bang" works like an automobile engine using gas, air and a spark. Keep it clean and never use an "over-load".

"Big-Bang" 60 M M cannon is operated as follows:

"To operate 'Big-Bang' the breech-block is removed, a small quantity of water is poured into the breech-opening into a water-chamber inside the gun or cannon; 'Bangsite' is then added on the drag beam which is on the reverse side of the breech-block. The breech-block is then inserted into the water chamber, turned to the right until locked by the lugs; by so doing, the 'Bangsite' falls or drops into the water, resulting in the formation of a gas; allow a few seconds to form sufficient gas and mix with air in the gun; the ignitor or plunger is pulled back (ignitor works on the same principle as flint operated cigarette lighter) and then pushed back quickly so as to create a spark off the flint and the gas and air mixture is exploded creating a large noise or explosion. 'BANG! Sparks given off ignite the mixture of gas and air just like a gas engine.' 'CAUTION': Blow into breech-opening every time before reloading so as to replace the burned gas from the last shot with fresh air for the next shot."

Webster defines the word explode: (1) "To cause to explode, or burst noisily, to detonate; to explode power." Further, the word explosion: (2) "Act of exploding, detonation; a violent bursting or expansion with noise, following the sudden production of great pressure, as in the case of explosives." Further, explosive: "An explosive substance, especially one used to produce an explosive effect."

The use and operation of this device as to explode, explosion or explosive is covered by Webster's definitions.

Paragraph 127 of Chapter 127½ of the Ill. Rev. Stat. 1961, provides as follows:

127. "Fireworks" defined.] #1. The term fireworks shall mean and include any explosive composition, or any substance or combination of substances, or article prepared for the purpose of producing a visible or audible effect of a temporary exhibitional nature by explosion, combustion, deflagration or detonation, and shall include blank cartridges, toy cannons, in which explosives are used, * * *, or any tablets or other device containing any explosive substance, or containing combustible substances producing visual effects."

Paragraph 128 of Chapter 127½ of the Ill. Rev. Stat. 1961, provides as follows:

128. "The sale, use or explosion of fireworks prohibited—Public displays and Permits.] Except as hereinafter provided it shall be unlawful for any person, firm, and co-partnership, or corporation to offer for sale, expose for sale, sell at retail, or use or explode any fireworks; * * *"

The City of Chicago, by virtue of the powers granted it by paragraphs 11-8-4 of Chapter 24, passed an ordinance that is Section 125-27, to wit:

125-27. "Fireworks—Definition. The term fireworks shall mean and include any explosive composition, or any substance or combination of substances, or article prepared for the purpose of producing a visible or audible effect of a temporary exhibitional nature by explosion, combustion, deflagration or detonation, and shall include blank cartridges, toy cannons, in which explosives are used, * * * and any fireworks containing any explosive compound, or any tablets or other device containing any explosive substances, or containing combustible substances producing visual effects; * * *"

which is identical to paragraph 127 of Chapter 127½ of the Ill. Rev. Stat. 1961.

Further, the City Council of the City of Chicago enacted an ordinance, Section 125-28 entitled Prohibitions to wit:

125-28. "No person shall have, keep, store, use, manufacture, assemble, mix, sell, handle or transport any fireworks; * * *."

125-28.1. "No person shall advertise, print, publish, or cause to be advertised, printed, or published in any newspaper or other publication having a general circulation in the city, or which is sold or offered for sale within the city, or by means of any handbill, circular, or poster, any advertisement or notice of sale or delivery within the city of any fireworks, except to a person to whom a permit has been issued as provided by section 125-29 and 125-30 of this code."

"'Big-Bang' 60 M M Cannon" and other models of toy cannons as depicted in the brochures submitted, are toy cannons as defined in the State Statutes and the City Ordinances and come within the prohibition as to the sale, use and operation of the same.

I am returning herewith the brochures submitted with the request and under separate cover I am returning "Big-Bang" Cannon Model 60 M M with a tube of Bangsite.

PSYCHIATRIC CENTER

*(Division Marshal in Charge, Bureau of Fire Prevention—E. W. P.
—August 31, 1962)*

Reference is made to your letter of July 19, 1962, with regard to the new Jewish Children's Psychiatric Center located at the Northeast corner of 55th and Cottage Grove Avenue, Chicago, Illinois. You advise that the Center will consist of several buildings, namely, a one-story school building, an office building and a dormitory building that are multiple storied. The children treated there will be housed, fed, and treated on a permanent basis. You state that a fire-alarm is not required in this particular case, although a Class III system will be installed with no City tie.

You further state that this is not a penal institution but a private treatment center and the question arises with reference to electric locks on doors leading out of dormitory sections. Section 67-9.2 of the Municipal Code provides as follows:

"(a) All doors used in connection with exits shall be so arranged as to be readily opened without the use of a key from the side from which egress is made.

(b) In Assembly Units, exit doors serving more than 200 persons shall be equipped with approved latches or bolts which release under a pressure of fifteen pounds.

(c) In rooms of Institutional Units used as jails or similar places of detention for more than ten persons, approved releasing devices with remote control shall be provided for emergency use."

While it is true that the use does not constitute a penal institution, Chapter 91½ of Illinois Revised Statutes (1961), Sections 141, 151 and 201, category insane persons confined to certain penal institutions, interim care in private institutions, and care and treatment of mentally deficient persons. It is our opinion that the use you describe is an institutional use and a place of detention and should come within the provisions of Section 77-9.2, Subsec-

tion (c). This Psychiatric Center should be so conducted that there will always be an attendant present with ready access to the releasing lock device on the doors. It is our opinion that under these circumstances the electric locks should be permitted.

HEATING ORDINANCES

(B. J. B.—C. N.—October 10, 1962)

Answering your letter of October 2, 1962, under Section 96-4 of the Municipal Code of Chicago, any person owning or controlling a multiple unit building is required to furnish heat in all apartments from September 15th of each year to June 1st of the succeeding year so that occupants may secure a minimum temperature of 60 degrees Fahrenheit at 6:30 a.m., 65 degrees at 7:30 a.m. and 68 degrees at 8:30 a.m. and thereafter until 10:30 p.m., averaged throughout the apartment. The ordinance requires that written notice of complaint concerning lack of heat shall first be given by registered mail to the person in control before a violation of the said section shall be deemed to exist. Any person violating this provision is subject to a fine of not less than ten dollars and not more than two hundred dollars for each offense.

In your instance, the degree of heat required is not subject to the whim or caprice of either the landlord or the tenant but rests upon the ordinance requirements as digested hereinabove. The thermostat you refer to is part of the landlord's heating system and he can restrict its use if the heat supplied comes within the ordinance specifications. If not, an avenue of relief is afforded the tenant by making due complaint to the City's Department of Buildings, in the Central Office Building, 320 N. Clark Street. Without first exhausting the remedies available, a tenant cannot use an unproved lack of the degrees of heat required as an excuse for breaking a lease.

MOBILE FOOD DISPENSERS

(J. B.—M. C. H.—January 9, 1963)

This is to acknowledge receipt of your letter to the Mayor's Office in which you complain about the Mobile Food Dispensing Vehicles giving unfair competition to dispensers in stores of fixed locations who have rent, gas, electric, help, food, license, driveway fees and other expenses.

The Chicago City Council on May 16, 1960 amended Chapter 130 of the Municipal Code of Chicago by adding Sections 130-15.1 to 130-15.20 which contain licensing and sanitary regulations of Mobile Food Dispensers, who by traveling from place to place call upon the public ways serving food or drinks from a wheeled vehicle in the City. The license fee for the Mobile Food Vehicle is \$50 per vehicle paid annually. Among other requirements, the vehicle must have adequate mechanical refrigeration for perishable food products, heating appliances for storage of foods as required and washing sink and an adequate supply of running hot water, waste water retention tank and proper refuse containers of a non-absorbent washable nature.

The regulations provide that Mobile Food Dispensers shall not be operated in a fixed location and shall move from place to place upon the public ways. Stops are to be made only to serve customers and are not to exceed 30 minutes in duration. No food other than individual portions that are totally enclosed in a wrapper or container which has been prepared in a duly licensed food establishment licensed by the City shall be served from or

by a Mobile Food Dispenser. Ice cream, ice milk, frozen dessert, mix, sodas, sundaes and other frozen desserts manufactured or processed on or served from the Mobile Vehicle shall be prepared from ingredients dispensed from an approved dispenser only. A vehicle serving frozen desserts shall comply with regulations of the Board of Health pertaining to Mobile Units handling frozen desserts.

The competition you complain of given you by the Mobile Food Dispensers is not in our opinion, keener than any licensed food dispenser in a fixed location next door to you. On the contrary, Mobile Food Dispensers under Chapter 130-15.20 of the City Code are authorized to make stops only to serve customers and should not exceed 30 minutes in duration.

In view of the fact that the Mobile Food Dispensers are licensed and are in compliance with the Board of Health regulations as above stated, we fail to see how they can be legally stopped from operating from place to place upon the public ways.

LITTERING AND LOITERING

*(Executive Director, Cosmopolitan Chamber of Commerce—A. F. G.
—August 28, 1963)*

As requested we send you copies of the sections of the Municipal Code of Chicago relating to "littering" and "loitering". There is no particular section which deals solely with the latter subject, but loitering is treated in sections 193-1 and 193-3. There is no provision in the Code requiring the posting of "No Loitering" signs, but the Commissioner of Streets advises that his department has such signs which they post at particular locations when requested to do so by the Commissioner of Police.

LITTERING

"Section 36-46 (Casting refuse and liquids) It shall be unlawful for any person, in person or by his agent, employee or servant, to cast, throw, sweep, sift or deposit in any manner in or upon any public way or other public place in the city, or in or upon the waters of Lake Michigan, or any river, canal, public water, drain, sewer or receiving basin within the jurisdiction of the city, any kind of dirt, rubbish, waste article, thing or substance, whatsoever, whether liquid or solid. Nor shall any person cast, throw, sweep, sift or deposit any of the aforementioned items anywhere within the jurisdiction of the city in such manner that it may be carried or deposited, in whole or in part, by the action of the sun, wind, rain or snow, into any of the aforementioned places.

Provided, that this section shall not apply to the deposit of material under a permit authorized by any ordinance of the city; or to goods, wares, or merchandise deposited upon any public way or other public place temporarily, in the necessary course of trade, and removed therefrom within two hours after being so deposited; or to articles or things deposited in or conducted into the city sewer system through lawful drains in accordance with the ordinances of the city relating thereto.

Any person violating any of the provisions of this section shall be fined not less than \$10.00 for each offense. (Amend. Coun. J. 6-23-55, p. 656.)"

LOITERING

"Section 193-1 (Disorderly conduct) All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits

of the city; all persons who shall collect in bodies or crowds for unlawful purposes, or for any purpose, to the annoyance or disturbance of other persons; all persons who are idle or dissolute and go about begging; all persons who use or exercise any juggling or other unlawful games or plays; all persons who are found in houses of ill-fame or gaming houses; all persons lodging in or found at any time in sheds, barns, stables, or unoccupied buildings, or lodging in the open air and not giving a good account of themselves; all persons who shall wilfully assault another in the city, or be engaged in, aid, or abet in any fight, quarrel, or other disturbance in the city; all persons who stand, loiter, or stroll about in any place in the city, waiting or seeking to obtain money or other valuable things from others by trick or fraud, or to aid or assist therein; all persons that shall engage in any fraudulent scheme, device, or trick to obtain money or other valuable thing in any place in the city, or who shall aid, abet, or in any manner be concerned therein; all touts, ropers, steerers, or cappers, so called, for any gambling room or house who shall ply or attempt to ply their calling on any public way in the city; all persons found loitering about any hotel, block, barroom, dramshop, gambling house, or disorderly house, or wandering about the streets either by night or day without any known lawful means of support, or without being able to give a satisfactory account of themselves; all persons who shall have or carry any pistol, knife, dirk, knuckles, slung shot, or other dangerous weapon concealed on or about their persons; and all persons who are known to be narcotic addicts, thieves, burglars, pickpockets, robbers or confidence men, either by their own confession or otherwise, or by having been convicted of larceny, burglary, or other crime against the laws of the state, who are found lounging in, prowling, or loitering around any steamboat landing, railroad depot, banking institution, place of public amusement, auction room, hotel, store, shop, public way, public conveyance, public gathering, public assembly, court room, public building, private dwelling house, house of ill-fame, gambling house, or any public place, and who are unable to give a reasonable excuse for being so found, shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally fined not less than one dollar nor more than two hundred dollars for each offense. (Amend. Coun. J. 5-24-51, p. 312.)"

"Section 193-3 (Vagrancy) All persons who are idle and dissolute, or who go about begging; all persons who use any shell game, sleight-of-hand, or juggling trick, or other unlawful game to cheat, defraud, or unlawfully obtain money or other valuable thing; pilferers; confidence men; common drunkards; common night walkers; persons lewd, wanton, or lascivious in speech or behavior; common brawlers; persons who are habitually neglectful of their employment or their calling, and do not lawfully provide for themselves or for the support of their families; and all persons who are idle or dissolute and who neglect all lawful business, and who habitually mispend their time by frequenting houses of ill-fame or gaming houses; all persons lodging in or found in the night time in sheds, barns, or unoccupied buildings or lodging in the open air, and not giving a good account of themselves; and all persons who are known to be thieves, burglars, or pickpockets, either by their own confession or otherwise, or by having been convicted of larceny, burglary, or other crime against the laws of the state punishable by imprisonment in the state prison or in a house of correction of any city, and having no lawful means of support, are habitually found prowling around any steamboat landing, railroad depot, banking institution, broker's office, place of public amusement, auction room, store, shop, or crowded public way, public conveyance, or at any public gathering or assembly, or lounging about any court room, private dwelling houses, or are found in any house of ill-fame or gambling house, are hereby declared to be vagabonds, and shall be fined not to exceed one hundred dollars for each offense. (Amend. Coun. J. 12-21-39, p. 1396)"

REPOSSESSION OF MOTOR VEHICLES

*(Committee on Police, Fire, Civil Service and Municipal Institutions
—A. F. G.—October 2, 1963)*

Your letter of September 5, 1963 reads as follows:

"It is requested that your office furnish to the Committee on Police, Fire, Civil Service, Schools and Municipal Institutions an opinion of the Corporation Counsel as to requirements necessary for automobile firms or finance companies to repossess cars upon which there has been a default on time payments under a Conditional Sales Contract.

The committee has received complaints that the police department has been stopping individuals who have repossessed such cars even though they have in their possession an affidavit of ownership from the holder of the legal title to the repossessed automobiles.

Our staff has taken this matter up with the officials of the Police Department and they have indicated that a general directive covering such seizures will be directed to all members of the department as soon as they are furnished a legal opinion from your office detailing the rights of parties to repossess automobiles upon default of conditional sales contracts.

An opinion from your office covering this matter is requested as soon as possible so that the police department may issue a directive covering same."

Section 9-503, Chapter 26 (Commercial Code) of the Illinois Revised Statutes 1961, reads, in part, as follows:

"9—503. Section 9—503. Secured Party's Right to Take Possession After Default. Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. . . ."

The standard form of contract for conditional sales of motor vehicles contains a provision that in the event of default in payments by the debtor the creditor may repossess the vehicle.

It is our opinion, therefore, in view of the statutory approval quoted above and the contractual agreement of the parties, that repossession as shown in your letter is legal and valid.

The creditor or his agent who takes possession should carry such identification as to convince a police officer that he is not a car thief, without being subjected to undue delay and red tape.

We suggest that a representative of the police department meet with representatives of the finance companies to agree on a satisfactory method of identification.

TICKET FOR ACCUMULATION OF GARBAGE

(Corporation Counsel, Decatur, Illinois—R. N.—May 6, 1964)

You request copy of an ordinance which prohibits accumulation of refuse on private property and "which is enforced by giving a 'ticket' which is similar to a traffic ticket." Section 99-61.7 to which you refer reads as follows:

It shall be unlawful for any person to place, leave, dump, or permit to accumulate any garbage or trash in any building, structure or premises so that the same shall afford food or harborage for rats, or to dump or place on any premises, land or waterway any dead animals or waste vegetable or animal matter of any kind. (Added. Coun. J. 9-19-46, p. 6334.)

Penalty for violation is under section 99-74 which reads as follows:

Any person violating any of the provisions of this chapter shall be fined not less than five dollars and not more than two hundred dollars for each offense, except where otherwise specifically provided. A separate and distinct offense shall be held to have been committed each day any person continues to violate any of the provisions hereof. (Amend. Coun. J. 6-11-47, p. 308; 6-30-54, p. 7829.)

The administrative procedure for enforcement is under the jurisdiction of the Bureau of Sanitation, and we have referred your inquiry to Mr. William Hart of that bureau who will furnish you with the information.

LOCATION OF GARBAGE CONTAINERS

(H. P.—E. W. P.—November 4, 1964)

We have your letter of October 30, 1964 with reference to the location of garbage containers and also the height of hedges and fences. You ask if there is an ordinance as to where garbage cans have to be placed. Section 99-17 of the Municipal Code reads in part as follows:

"... No container used for the storage, collection and removal of garbage or other refuse shall be placed so as to constitute a nuisance to adjacent property or the occupants thereof." Section 99-15 reads as follows:

"99-15. (a) Standard refuse container. The standard refuse container required by this chapter shall be a receptacle of not less than twenty nor more than thirty-two gallons capacity, of impervious material and sturdy construction, with a tight fitting cover, equipped with at least two handles properly placed to facilitate handling, and shall be subject to the approval of the commissioner of streets and electricity. Provided, however, that for a period ending not later than January 1, 1947, the commissioner of streets and electricity is authorized to permit the temporary use of containers of suitable size and in good condition and repair in place of a standard refuse container.

(b) Sanitary refuse container. The sanitary refuse container required by this chapter shall be a receptacle constructed of impervious material and subject to the approval of the board of health."

With reference to the construction of fences, Section 43-16 reads as follows:

"43-16. It shall be unlawful for any person to erect or construct any fence more than five feet in height within the city limits without first obtaining a permit from the commissioner of buildings."

DISEASED TREES CONSTITUTING NUISANCE

*(General Superintendent, Bureau of Forestry and Parkways—
E. W. P.—December 3, 1964)*

We have a complaint from a Mr. Gordon F. Harvey, 10608 S. Christiana Avenue, Chicago, copy of which we attach. Mr. Harvey complains of two Box Elder trees infested with bugs on a vacant piece of property at approximately 10621 S. Christiana Avenue. It advises that these black and red, hard shelled, flying bugs are crusted on adjacent homes and get inside the homes.

Section 99-9.1 specifies that all trees affected with Dutch Elm disease are declared to be a nuisance and provides that any person owning or controlling the plot of ground upon which such tree is situated shall cause such tree to be sprayed and removed from such premises and burned. It also provides that on the failure of the owner or person in control to remove the tree that your department shall proceed to have the tree sprayed, removed and burned and that any expense incurred by the City in doing so shall be charged to the owner so failing, which may be recovered at law instituted by our office.

Section 99-3 provides that when there is no provision defining a nuisance and how the same may be removed, abated, or prevented, in addition to what may be declared such herein, and which is known as a nuisance to the common law may be treated as such, and proceeded against as is provided by the Code.

It is our opinion that by these provisions that you may exercise the prerogative of serving notice on the owner of the property where these trees are situated, to have these trees sprayed and, if necessary, removed. After this notice is served and within a reasonable time thereof for a response, we believe that you should make an investigation of the property and should this diseased condition continue please advise us and we will then proceed with action for the abatement of the nuisance.

AMENDED CURFEW ORDINANCE

(Director, Youth Division—M. E. A.—July 29, 1965)

Reference is made to a letter of July 13, 1965, in which you request our opinion as to whether the hours of the Chicago Curfew Ordinance (Section 190-2 of the Municipal Code of Chicago) have been amended to conform to the hours set forth in the State Curfew Statute (Ill. Rev. Stat. 1963, ch. 23, Section 2371). The hours of the Chicago Curfew Ordinance have not been so amended.

However, on March 10, 1965, the Chicago Curfew Ordinance was amended in a manner not pertaining to the curfew hours as such. This amendment is as follows:

"Be It Ordained by the City Council of the City of Chicago:

Section 1. Section 190-2 of the Municipal Code of Chicago is amended by changing the first paragraph thereof to read as follows:

'It shall be unlawful for any person under the age of seventeen years to be *present at*, or upon any public *assembly, building, place, street or highway*, in the city between the hours of 11:30 p.m. Friday and 6:00 a.m. Saturday, or between the hours of 11:30 p.m. Saturday and 6:00 a.m. Sunday, or between the hours of 10:30 p.m. and 6:00 a.m. on any other day of the week, unless accompanied and supervised by a parent, *legal guardian* or other *responsible companion* at least twenty-one years of age *approved by a parent or legal guardian*, or unless engaged in some occupation or business in which such child may lawfully engage under the statutes of this state'.

Section 2. This ordinance shall become effective upon its passage and due publication."

SAFETY PROVISIONS FOR DISTILLING AND CONDENSING MATERIALS

(*Division Marshal in Charge, Bureau of Fire Prevention—M. M. M.
—August 11, 1965*)

Your letter of July 14th, 1965, addressed to the Corporation Counsel, has been referred to the writer for a reply.

You requested an opinion as to whether or not the captioned company may be issued a license under the provisions of Chapter 120 (drug chemical or paint stores (wholesale)), without complying with the safety clearances as provided in Chapter 60-11 of the Municipal Code of Chicago.

Chapter 60-11, provides:

"60-11. All distilling and condensing plants, except as provided in Section 60-103, shall have a clearance of not less than three hundred (300) feet in reference to any building or lot line."

From our investigation and your description it appears that the process conducted on the captioned premises consists primarily of:

1. Grinding scrap Plexiglass and Lucite
2. Pyrolysis of ground plastic
3. Washing crude methyl methacrylate
4. Final purification by fractional distillation and condensing.
5. Storage of methyl methacrylate.

Since there is no definition of the "distilling and condensing plants" in the present Municipal Code, we reviewed the previous provisions of Chapter 60-11 which was first enacted in 1938 as Chapter 51-11. After considerable research to determine the intent of the City Council in the use of the words "distilling and condensing plants", in Chapter 60-11, we believe that the City Council was guided by the provisions of the *National Board of Fire Underwriters Suggested Municipal Fire Prevention Code* then in effect, which provides as follows:

"No license shall be granted for the establishment of a new plant or an addition to a plant for refining, *distilling or condensing* petroleum and natural gas within the limits of the city until after a survey has been made by the Chief of the Bureau of Fire Prevention and an investigation made of all hazardous conditions connected therewith. If there

are no schools, churches, hospitals or public halls within three hundred (300) feet, and no other buildings than those of the plant within one hundred fifty (150) feet of the proposed *distilling or condensing* plant, and other conditions are consistent with the spirit and intent of this ordinance, the Chief of the Bureau of Fire Prevention shall grant a permit for the location desired; provided, also, that a guarantee to maintain an open space one hundred fifty (150) feet on all sides shall be given by the applicant." (Emphasis supplied.)

We are therefore of the opinion that it was the intent of the City Council that the restrictions of 60-11 only applied to distilling and condensing plants using petroleum or natural gas and the operation conducted on the captioned premises and as previously set forth, does not fall within the provisions of Chapter 60-11.

THE SALE OF CONTRACEPTIVE DEVICES

(M. C. H.—November 22, 1965)

We are in receipt of your letter to this office in which inquiry is made whether or not it is legal to sell contraceptives through vending machines.

Section 192-11 of the Municipal Code of Chicago provides as follows:

"No person shall sell or offer to sell, give away, offer to give away, distribute, or have in his possession with intent to give away, sell or distribute in or upon any public way or other public place of the city, any book, pamphlet, circular, handbill, advertisement, or notice of any kind purporting to treat of, or treating of diseases known as "venereal diseases," describing, explaining, or purporting to describe or explain the genital organs, giving or purporting to give the nature and remedies of diseases peculiar to females, uterine diseases, or the nature or causes of nervous debility, impotency, sterility or barrenness, gonorrhea, gleet, stricture, syphilis, affection of the prostate gland, or the remedies thereof, or the cause or remedies for abortion or miscarriage, or articles or means of preventing conception, or giving or purporting to give information from whom or where medicine or anything whatever may be obtained for the prevention, treatment, or cure of any of the above mentioned diseases or conditions.

"Any person violating the provisions of this section shall be fined not less than twenty-five dollars nor more than one hundred dollars." Section 192-12 of the Municipal Code of Chicago reads as follows:

"No person shall advertise, print, publish, or cause to be advertised, printed or published in any newspaper or other publication having a general circulation in the city, or which is sold or offered for sale within the city, any advertisement, notice, or mention of any kind giving or purporting to give any information of, from whom or where, apparatus, medicine, remedies, or alleged cures may be obtained for the cure, prevention, or treatment of uterine diseases or of diseases peculiar to females, or of venereal diseases or of diseases of the genital organs, or of nervous debility, impotence, sterility or barrenness, or of gonorrhea, gleet, stricture, syphilis, or affections of the prostate gland, or from whom or where may be obtained any advice, information, direction, or knowledge of any drug, medicine, mixture, preparation, instrument, apparatus, or means of any kind for the purpose of causing or procuring a miscarriage by any woman pregnant with child, or for the purpose of causing or producing an abortion, or for the purpose of preventing conception."

An amendment has been added by the city council on June 23, 1965, which reads as follows:

"Providing further that the provisions of this section shall not apply to the Board of Health."

In view of the above, it is our opinion that the sale of contraceptives through vending machines or over the counter is prohibited under the above sections.

STANDARD REFUSE CONTAINER CODE PROVISIONS

(D. F. B.—M. S.—March 22, 1966)

This is to acknowledge receipt of the copy of your letter to Mr. James V. Fitzpatrick, Commissioner of Streets and Sanitation, dated March 9, 1966 by the Corporation Counsel.

In your letter you express your concern regarding the "Warning Notice" dated March 9, 1966 notifying you that you were in violation of Section 99-16 of the Municipal Code of Chicago and the attached form requesting your permission to destroy and remove your cement garbage box. You state that your purpose in writing to the Corporation Counsel is to inform yourself of the law so as to enable you to abide by its provisions.

The following Sections of the Municipal Code of the City of Chicago are pertinent to your request.

"99.15 (a) Standard refuse container. The standard refuse container required by this chapter shall be a receptacle of not less than twenty nor more than thirty-two gallons capacity, of impervious material and sturdy construction, with a tight fitting cover, equipped with at least two handles properly placed to facilitate handling, and shall be subject to the approval of the Commissioner of Streets and Electricity. Provided, however, that for a period ending not later than January 1, 1947, the Commissioner of Streets and Electricity is authorized to permit the temporary use of containers of suitable size and in good condition and repair in place of a standard refuse container.

"Except in the case of the multiple dwelling where the refuse is removed at the expense of the owner, it shall be the duty of the owner, or his agent, of every multiple dwelling to provide and maintain in good condition and repair standard refuse containers whose combined capacity shall not be less than fifteen gallons per living unit.

"Except in the case of the occupational unit where the refuse is removed at the expense of the occupant, it shall be the duty of the occupant of every occupational unit to provide and maintain in good condition and repair not less than one standard refuse container.

"The owner or his agent of every multiple dwelling where the refuse is removed at the owner's expense shall provide at least one sanitary refuse container for each floor and not less than one sanitary refuse container for every ten persons dwelling therein.

"The occupant of every building where refuse is removed at the occupant's expense shall provide a sufficient number of sanitary refuse containers for the temporary storage of all refuse accumulating between collections.

"All refuse which is placed for collection service outside of the building must be kept in standard refuse containers.

"99.17 Except in the case of those buildings where the owner or occupant is required to cause the removal of refuse therefrom at his own cost and expense, the standard container shall be placed in the following manner:

"(a) For alley collections, at the alley lot line on the premises served so as to be immediately accessible to refuse collection vehicles. It shall be the duty of the owner or his agent to provide suitable space at the alley line for such container or cause all refuse produced therein to be removed at his own cost and expense.

"(b) For curb collections, at the curb line not earlier than the evening preceding the designated day of collection, and removal not later than the evening of such day.

"No container used for the storage, collection and removal of garbage or other refuse shall be placed so as to constitute a nuisance to adjacent property or the occupants thereof."

Nowhere in the ordinances is mention made of the removal of cement containers; in accordance with the above quoted ordinances, they lack the qualifications of a refuse container. Therefore, the keeping of a cement container would not per se constitute a violation of the ordinance. However, if garbage or refuse were at any time deposited therein, or if it were to become a breeding ground or haven for mice, rats, rodents, bugs, germs or filth, it would become a nuisance and a health hazard and thus, it would have to be removed. One should also be aware of Section 99.77 (a) as noted above in order to determine whether the concrete box interferes with the requirement of placing the refuse containers at the alley lot line, before deciding whether to retain or remove the concrete box.

The answers to your inquiries as to whether contracts have been awarded for the removal of the concrete boxes, and if they were, to whom and at what cost, are not within our knowledge at this time; said information may be available in the Department of Streets and Sanitation.

BLANK CARTRIDGES

(Superintendent of Police—M. E. A.—April 27, 1966)

Reference is made to your letter of April 13, 1966, in which you request our opinion as to whether the sale in Chicago of the Italian manufactured blank cartridge pistol together with the blank cartridges as described in the copy of the advertising material attached to your letter would be a violation of Section 125-27 of the Municipal Code of Chicago.

The pertinent provisions of Section 125-27 are set forth as follows:

Fireworks

"125-27. The term fireworks shall mean and include any explosive composition, or any substance or combination of substances, or article prepared for the purpose of producing a visible or audible effect of a temporary exhibitional nature by explosion, combustion, deflagration or detonation, and shall include blank cartridges, toy cannons, in which explosives are used, the type of ballons which require fire underneath to propel the same, firecrackers, torpedoes, skyrockets, roman candles, sparklers, bombs, or other fireworks of like construction and any fireworks containing any explosive compound or any tablets or other device containing any explosive substances, or containing combustible substances producing visual effects . . ."

The penalty provision for violation of Section 125-27 is set forth in Section 125-33 as follows:

"Any person violating any of the provisions of this chapter shall be fined not less than twenty-five dollars nor more than two hundred dollars for each offense except where otherwise provided; and a separate and distinct offense shall be considered as having been committed for each and every day any person shall violate any of the said provisions of this chapter."

Based upon these provisions, together with the laboratory report of the Chicago Police Department attached to your letter, which classifies the powder enclosed in the blank cartridges as "fireworks", it is our opinion that the sale of the above-described materials in the City of Chicago would be in violation of Section 125-27 of the Municipal Code of Chicago.

CHAPTER VI—LICENSES AND PERMITS

Section A. LIQUOR LICENSES

RETAIL LIQUOR NEAR HOSPITAL

(Director, Organized Crime Division—H. A. I.—March 9, 1961)

This acknowledges receipt of your communication transmitting an application for a retail liquor license filed by the Drexler-Prairie-Shores Pharmacy, Inc., for the premises at 2903 S. Vernon Avenue, in the City of Chicago. You request our opinion as to whether this application should be approved "in view of the fact that this proposed location is approximately 90 feet from the Michael Reese Hospital."

From our examination of the official Sanborn Map in the Map Department of the City of Chicago, we have ascertained that the premises sought to be licensed are located in the Northwest portion of the recently created Prairie-Shores Shopping Center at 2901-19 South Vernon Avenue, occupying the area bounded by Vernon Avenue to the West, 29th Street to the North, and 29th Place to the South; the East boundary being approximately 225 feet East of Vernon Avenue.

As a result of its recent land acquisition and expansion program the Michael Reese Hospital has acquired a substantial area of vacant land West of its present boundaries. Much of this land is now being devoted to parking facilities for the use of persons visiting the hospital institution. The areas immediately to the East of the shopping center site, as well as the areas extending West on the North side of 29th Street and the South side of 29th Place for a distance of several hundred feet directly across the street from such shopping center, are now devoted to hospital parking facilities.

The distance between the closest point of the premises sought to be licensed and the parking facilities along the North side of 29th Street measures 90 feet. The distance between these premises and the original boundary lines of the Michael Reese Hospital prior to its land acquisition program is over 200 feet. The Mandel Clinic occupying the Northeast corner of East 29th Street and Ellis Avenue, the closest hospital building, is over 250 feet away from such premises.

The question presented by your communication is whether parking lots owned and operated by a hospital are entitled to the protection of Section 8 of Article VI of the Illinois Liquor Control Act, which provides in part:

"No license shall be issued for the sale at retail of any alcoholic liquor within 100 feet of any church, school, hospital * * *."

We have previously held (Opinions of Corporation Counsel, Vol. XVIII, p. 485):

"That in cases of churches owning vacant land surrounding their building devoted to church purposes the measurement should be made to the nearest point of the *church owned premises devoted to church purposes*. In other words, the mere church owned vacant land is not in our opinion entitled to protection." (Emphasis ours.)

It is our opinion that the protection afforded by Section 8 of Article VI of the Illinois Liquor Control Act cannot be extended to include hospital land used for parking purposes. Until such time as the Michael Reese Hospital puts this property to actual hospital use, it cannot be considered devoted to hospital purposes. Therefore, you should approve the application of the Drexler-Prairie-Shores Pharmacy, Inc., at 2903 S. Vernon Avenue, if the applicant is otherwise qualified.

We are returning the application for retail liquor dealer license which was submitted by the Drexler-Prairie Shores Pharmacy, Inc.

LIQUOR NEAR SCHOOL

(Deputy Liquor Control Commissioner—H. A. I.—June 15, 1961)

This acknowledges receipt of your letter of June 6, 1961 transmitting a communication received from attorneys representing Joseph L. Stone, who advise you that Mr. Stone is contemplating purchasing the Belmont Theater Building at Lincoln, Belmont and Ashland Avenues in the City of Chicago, and intends to remodel this building into bowling alleys. In addition, Mr. Stone intends to convert the lobby portion of the theater into a cocktail lounge, which he will lease to a third party. The transmitted communication points out that "this contemplated lounge will be completely separate and cut off from the bowling alley space. Entrance will be off of the main entrance on Belmont Avenue and will have an address separate from that of the bowling alley. It is intended that such cocktail lounge will be a separate and distinct operation from that of the bowling alley."

The communication further points out that the Burley Public School is located at 630 Barry Avenue; that immediately North of this school building is a school playground extending northward to an alleyway; that the rear of the theater building abuts on this same alleyway and is separate from the school playground by approximately 48 feet.

You request our opinion as to whether a retail liquor license of the City of Chicago may properly issue to the proposed cocktail lounge in view of the proximity of the Burley Public School Building and adjoining playground.

Section 8 of Article VI of the Illinois Liquor Control Act provides in part:

"Section 8. No license shall be issued for the sale at retail of any alcoholic liquor within 100 feet of any church, school, hospital, home for aged or indigent persons or for veterans, their wives or children or any military or naval station; provided, that this prohibition shall not apply to hotels offering restaurant service, regularly organized clubs, or to restaurants, food shops or other places where sale of alcoholic liquors is not the principal business carried on, if such place of business so exempted shall have been established for such purposes prior to the taking effect of this act; nor to the renewal of a license for the sale at retail of alcoholic liquor on premises within 100 feet of any church where such church has been established within such 100 feet since the issuance of the original license. * * *

From our study of the entire section it is apparent that said section should be construed to read as though written as follows:

No license shall be issued for the sale at retail of any alcoholic liquor on premises within 100 feet of any church, school, hospital, etc.

Section 11 of Article VII of the Illinois Liquor Control Act provides in part:

"Section 11. Licenses issued hereunder apply only to the *premises* described in the application and in the license issued thereon, and only one location shall be so described in each license. * * *" (Emphasis added.)

Rule 1, Sub-section (g) of the Official Rules and Regulations issued by the Illinois Liquor Control Commission defines premises as follows:

"(g) 'Premises' or 'Place of Business' means the place or location where alcoholic beverages are manufactured, stored, displayed, offered for sale or where drinks containing alcoholic beverages are mixed, concocted and served for consumption. Not included are sidewalks, streets, parking areas and grounds adjacent to any such place or location."

The answer to your inquiry hinges on the construction of the term "premises" as used in the Illinois Liquor Control Act. While there are no reported Illinois cases defining premises as used in the Illinois Liquor Control Act, the Attorney General of Missouri in construing similar provisions of the liquor Act of the State of Missouri has ruled as follows (Attorney General of Missouri interpretation June 10, 1935) :

" 'Premises' should be given a narrow meaning and restricted to the building or place in which the licensee will sell intoxicating liquor. In other words, we believe that 'premises' used in the Liquor Act was intended by the Legislature to be the place where the person would conduct the selling of liquor, and it may be one room, a building comprising several rooms, * * * and when a licensee makes application, said premises should be described in metes and bounds, and should state thereon whether or not it is to be sold in a building comprising several rooms or in one room, or on a parcel of ground with a building thereon.

Mindful of the fact that 'premises' governing the sale of intoxicating liquors presents numerous questions, we shall make the following observations concerning the same:

Partitions may be run through a building which would make two separate premises, which, however, must be distinct and separate from each other, capable of being individually described in the license, so that non-intoxicating beer for consumption on the premises may be sold under a permit describing a one premise which has been partitioned off, and another permit may also be issued describing the other premises for the sale of intoxicating liquor * * *."

From the transmitted communication it appears that the proposed cocktail lounge will be physically separated from the bowling alley area by permanently constructed walls. Applying the tests set out in the cited authorities, we must hold that the proposed cocktail lounge will constitute "premises" separate and distinct from the bowling alley premises.

Since the plat of the floor plan of the Belmont Theater Building discloses that the location of the proposed cocktail lounge will be over 215 feet from the nearest point of the school playground it is obvious that the provisions of Section 8 of Article VI of the State Liquor Act can have no application.

It is therefore our opinion, that the proximity of the Burley Public School and its adjoining playground will be no bar to the issuance of a retail liquor license to the proposed cocktail lounge to be located in the lobby portion of the Belmont Theater Building.

ADDITIONAL LICENSE FOR MUSICIANS

(Director, Organized Crime Division—E. W. P.—June 22, 1961)

We have your inquiry of June 21, 1961 as to the interpretation of Section 147-12 of the Municipal Code, as to whether or not a tavern requires the additional license as stated therein for the employment of one musician. The section reads as follows:

"Any person licensed under this chapter shall have the privilege, upon the payment of an additional fee of seventy-five dollars, of providing upon the licensed premises an orchestra of not to exceed three pieces and permitting dancing by patrons therein, provided, however, no entertainers other than the members of such orchestra shall be engaged or permitted to perform therein. Such privilege shall terminate upon the termination, for any cause, of the city retail license for the sale of alcoholic liquor."

The word "orchestra" in this section means any number of people not to exceed three and, therefore, it is our opinion that this additional license is required for the employment of a piano player and permitting dancing by patrons in the tavern.

LATE HOUR LIQUOR LICENSE

(W. M.—H. A. I.—February 21, 1962)

This acknowledges receipt of your recent communication, requesting our opinion as to the propriety of the police department's approval of a Late Hour Liquor License Application of George N. Kamberes, for the premises located at 7418 Stony Island Avenue. You transmit the approved application, together with a police report and frontage consents and a list of the registered voters of the 10th Precinct of the 8th Ward, the precinct embracing the address at 7418 Stony Island Avenue.

You question whether the police department properly excluded signatures of registered voters residing on Blackstone Avenue. The ordinance relating to frontage consents requirements found in Chapter 147-13 of the Municipal Code of Chicago provides:

"* * * Any other persons licensed under this chapter shall be entitled to such privilege, upon payment of such additional fee, provided, however, that where one-half of the buildings wholly within a distance of three hundred feet from such person's licensed premises are used for residence or apartment house purposes, such person shall first obtain and file with the city collector the written consents of a majority of the legal voters resident within such area."

In computing the required number of signatures for frontage consents under the provisions of Chapter 147-13 above cited, only such legal voters residing in buildings wholly within 300 feet of the proposed premises may be taken into consideration. Those residing in a building, any part of which is more than 300 feet from such proposed premises are excluded from the computation.

Since the report of the police department indicates that all buildings located on Blackstone Avenue are more than 300 feet from the premises seeking the late hour license, it necessarily follows that no signatures of those legal voters residing on such street may be included in the computation.

It is, therefore, our opinion that the approval by the police department of the late hour application of George M. Kamberos for the premises located at 7418 Stony Island Avenue was not improper.

RESIDENCE REQUIREMENTS OF APPLICANT

(Director, Organized Crime Division—M. M.—January 21, 1963)

Your communication of December 10, 1962, has been referred to me. Said communication seeks an opinion as to the following 2 points:

1. Whether an abbreviated name of an original surname not legally changed through Court procedure is acceptable when a person makes an application for a City of Chicago Retail Liquor License?
2. Whether an applicant who maintains a home for himself and his family outside the city limits of the City of Chicago, registered his Illinois Auto License Plates and Illinois Driver's License on said address but who maintains an apartment in the City of Chicago satisfies the residence requirements necessary for a City of Chicago Retail Liquor License under the State Act?

As to the first point, Article IV, section 4 of the Illinois Liquor Control Act provides that the Local Liquor Control Commissioner shall have the power to examine applicants for Retail Liquor Licenses within his jurisdiction. Chapter 147-3 of the Municipal Code of Chicago provides as follows:

"When an application for a city retailer's license for the sale of alcoholic liquor shall be made in conformity with the general requirements of this Code relating to applications for licenses. The city collector shall forward the application to the mayor, as the local liquor control commissioner for such action as the mayor may see fit to take pursuant to law."

An essential part of the information required by the Mayor as Local Liquor Control Commissioner in order that he may properly evaluate the qualifications of the applicant is the applicant's correct legal name. A shortened version of a surname without proper Court action changing said name legally is not acceptable, for it does not permit the Mayor as Local Liquor Control Commissioner through the Police Department to make proper investigation concerning said applicant.

As to the second point, Article VI, section 2 of the Illinois Liquor Control Act provides:

"That no license of any kind issued by the State Commission or any Local Commission shall be issued to:

- (1) A person who is not a resident of the city, village or county in which the premises covered by the license are located; except in case of railroad or boat licenses."

There are many factors which go into making a determination as to what constitutes a bona fide residence within the meaning of the above quoted section. These factors include voting address, mailing address, driver's license address, registration of auto license address, registration of children in schools and where, in fact, the home of the family is maintained. The mere

renting of a room or giving of a street address within the city limits is not sufficient to establish residence where all other factors tend to indicate that the actual residence is not within the city limits.

In the case of *Noble v. Illinois Liquor Control Commission*, 24 Ill. App. 2d 444, the village originally issued a retail liquor license to the widow of an operator of a tavern in the village for the year 1957 on her assurance that she would become a resident of the village. She did not move to the village and maintained her residence elsewhere and in 1958 she rented a room in the village a half a block from the tavern. The Court held that she did not establish a bona fide residence in the village and that the Local Liquor Control Commissioner of the village was justified in refusing to renew her license for 1958.

It is therefore our opinion that all of the aforementioned factors and any other information pertinent thereto should be taken into consideration in making a determination as to residence within the City of Chicago.

CITIZENSHIP REQUIREMENT FOR APPLICANT

(*D. M.—J. G. O.—May 15, 1963*)

Your letter of May 11, 1963, addressed to the Honorable Richard J. Daley, Mayor, concerning the liquor license application of your client, Mr. Milan Nikolich, has been forwarded to this office for reply.

Please be advised that it is the opinion of this office that your client, Mr. Milan Nikolich, is not a qualified citizen under the Liquor Control Act of the State of Illinois, which states in part under Article VI, Section 2, as follows:

“No license of any kind issued by the State Commission or any local commission shall be issued to:

(3) A person who is not a citizen of the United States”
and it is our opinion that your client is not a “citizen of the United States” entitled to the privilege of a liquor license.

MODIFICATION OF PROHIBITION

(*City Collector—J. G. O.—May 17, 1963*)

This office has received a request for an opinion from you regarding the renewal of City of Chicago Retail Liquor License for the period commencing May 1, 1963, for Messrs. Jerome Reitman and Irving Berger for the premises located at 3559 W. 16th Street, Chicago, Illinois. The renewal application for the Messrs. Reitman and Berger for the above-mentioned premises was denied because of the construction of a City of Chicago primary grade school within the prohibited statutory distance from the aforesaid licensed premises. The aforementioned school was opened for educational purposes in September of 1962.

The Illinois Liquor Control Act, Ch. 43, Section 127, Illinois Revised Statutes, provides as follows:

“127. Retail sales near churches, schools, etc.] § 8. No license shall be issued for the sale at retail of any alcoholic liquor within 100 feet of any church, school, hospital, home for aged or indigent persons or for veterans, their wives or children or any military or naval station;

*provided, that this prohibition shall not apply to hotels offering restaurant service, regularly organized clubs, or to restaurants, food shops or other places where sale of alcoholic liquors is not the principal business carried on, if such place of business so exempted shall have been established for such purposes prior to the taking effect of this Act. * * *"* (Emphasis added.)

The facts recited by Mr. Reitman as stated in your letter are as follows :

1. The principal business conducted on the premises at 3559 West 16th Street is that of a food shop, which said business can be traced back to the year 1920.
2. The principal business currently conducted on the premises at 3559 West 16th Street is that of a food shop.
3. The applicants are engaged in selling alcoholic liquor at retail by package only in connection with their food store operation. Alcoholic liquor is not dispensed on the premises for consumption thereon, the food shop operations being the principal business.
4. That Messrs. Reitman and Berger in reliance on the provisions of the Liquor Control Act of the State of Illinois, as approved January 31, 1934, and as amended to and including July 1, 1961, have recently expended large sums of money to remodel the described food store premises.

Inasmuch as this establishment is a food shop where sale of alcoholic liquors is not the principal business carried on and inasmuch as said use has been established prior to the effective date of Ch. 43, Section 127, Illinois Revised Statutes, it is our opinion that the premises located at 3559 W. 16th Street falls within the exceptions as set forth in the aforementioned statute and that the applicants' license for renewal of a City Retailer's Alcoholic Liquor License should be granted.

PUBLIC PLACE OF AMUSEMENT LICENSE

(Superintendent of Police—M. M.—June 11, 1963)

Your letter of June 5, 1963, directed to the Corporation Counsel of the City of Chicago, wherein you request an opinion as to whether or not the holding of a public place of amusement license for premises also licensed for the sale of alcoholic liquor at retail exempt said premises from the provisions of Article VI, Section 20, of the Illinois Liquor Control Act which requires an unobstructed view of the licensed premises from the public way, has been referred to me.

Chapter 43, Article VI, Section 20, provides as follows :

"In premises upon which the sale of alcoholic liquor for consumption upon the premises is licensed (other than as a restaurant, hotel, club or any bowling alley other than one situated on the first, or ground floor) no screen, blind, curtain, partition, article or thing shall be permitted in the windows or upon the doors of such licensed premises nor inside such premises, which shall prevent a clear view into the interior of such licensed premises from the street, road, or sidewalk at all times, and no booth, screen, partition, or other obstruction nor any arrangements of lights or lighting shall be permitted in or about the interior of such licensed premises which shall prevent a full view of the entire interior of such premises from the street, road or sidewalk, and said premises must be so located that there shall be a full view of the entire interior of such premises from the street, road or sidewalk."

You will note, that the only exceptions to the above requirement are a restaurant, hotel, club or bowling alley other than one situated on the first or ground floor. There is no exception set forth relating to a public place of amusement other than those just mentioned. The holding of a public place of amusement license in and of itself does not exempt premises from the clear view requirement as set forth above. In order to be so exempted, the licensed premises must fall into one of the specified excepted classifications.

It is our opinion, therefore, that premises licensed for the sale of alcoholic liquor for consumption upon the licensed premises are not exempted from the requirement of Article VI, Section 20 of the Illinois Liquor Control Act for a clear view from the public way merely by reason of the fact that said licensed premises also possess a public place of amusement license.

CORPORATE LICENSE HOLDERS CHANGING OFFICERS

(City Collector—M. M.—November 26, 1963)

Your letter of November 4, 1963, directed to the Corporation Counsel of the City of Chicago, wherein you request an opinion as to whether a corporation licensed to engage in the sale of alcoholic liquor at retail at several locations, when changing corporate officers, may submit only one application for one location for recording the said change of officers if memoranda are inserted in the office record to show the change of officers in the applications on file for each respective location and whether the publication of notice of one original application for one location for the purpose of advertising the change of officers by the said corporation would be sufficient to cover all the licensed locations of the said corporation where the only change in the original applications for said licenses is that of the corporate officers, has been referred to me for reply. Your letter of November 4, 1963, contains extensive quotations from Sections 147-3 and 147-11 of the Municipal Code of the City of Chicago and Article X, Rule 11 of the Rules and Regulations adopted by the Illinois Liquor Control Commission.

The purpose of the requirement for publication contained in the aforesaid provisions is to give public notice that applications have been filed for a retail liquor license by certain parties at certain addresses. Public notice is given in order that the citizenry at large and those residents in the immediate area where the license is sought may be informed of the pending application in order that they might be experienced in objections they might have to the issuance of said license as provided for in the Illinois Liquor Control Act.

Although a particular person or corporation might have a liquor license for more than one location, each license is an individual license pertaining to a particular location and stands on its own with no relationship to any of the other premises licensed to the same licensee except when the license held by the licensee is revoked.

It would appear, therefore, that the established practice of your office in requiring an original application for registering the change of officers for each respective location licensed for the sale of alcoholic liquor at retail and the publication of notice of each respective application complies with the general purpose and intent of the Illinois Liquor Control Act provisions.

It is our opinion, therefore, that said established practice should be maintained.

CLOSING ON DAYS OF SPECIAL ELECTION

(Illinois Liquor Control Commission—J. C. M.—January 13, 1964)

In your letter of January 8, 1964, you request our opinion as to whether all retail licensees in the City of Chicago must close on the day of the special elections to be held on January 21, 1964, in the 1st, 11th and 24th Wards, or whether just the retail licensees in the Wards involved must close during the period the polls are open.

Chapter 46, Section 17-27 of the Illinois Revised Statutes provides:

"No intoxicating liquors shall be sold at retail or given away, nor shall any saloon or bar room or place where such liquor is so sold or given away be open upon the day of any national, State, county or municipal election, including primary elections, during the hours the polls are open, within the political area in which such election is being held."

In Chapter 43, Section 129 of the Illinois Revised Statutes similar provisions are contained.

In each statute the words "within the political area in which such election is being held" is provided. We are of the opinion that this language means the wards where these special elections are being held and, therefore, no alcoholic liquor shall be sold at retail during the hours the polls are open in the 1st, 11th and 24th Wards of the City of Chicago.

UNOBSTRUCTED VIEW

(Superintendent of Police—M. M.—March 10, 1964)

Your letter of March 6, 1964, directed to the Corporation Counsel of the City of Chicago, wherein you request an opinion as to whether or not the holding of a food dispenser's license for premises also licensed for the sale of alcoholic liquor at retail exempts said premises from the provisions of Article VI, Section 20, of the Illinois Liquor Control Act which requires an unobstructed view of the licensed premises from the public way, has been referred to me.

Chapter 43, Article VI, Section 20, provides as follows:

"In premises upon which the sale of alcoholic liquor for consumption upon the premises is licensed (other than as a restaurant, hotel, club or any bowling alley other than one situated on the first or ground floor) no screen, blind, curtain, partition, article or thing shall be permitted in the windows or upon the doors of such licensed premises nor inside such premises, which shall prevent a clear view into the interior of such licensed premises from the street, road, or sidewalk at all times, and no booth, screen, partition, or other obstruction nor any arrangements of lights or lighting shall be permitted in or about the interior of such licensed premises which shall prevent a full view of the entire interior of such premises from the street, road or sidewalk, and said premises must be so located that there shall be a full view of the entire interior of such premises from the street, road or sidewalk."

You will note, that one of the exceptions to the above requirement is a restaurant. Under the provisions of Article I, Section 2.23, restaurant is defined as follows:

“‘Restaurant’ means any public place kept, used, maintained, advertised and held out to the public as a place where meals are served, and where meals are actually and regularly served, without sleeping accommodations, such space being provided with adequate and sanitary kitchen and dining room equipment and capacity and having employed therein a sufficient number and kind of employees to prepare, cook and serve suitable food for its guests.”

The holding of a food dispenser’s license in and of itself does not exempt premises from the clear view requirement as set forth above, if, in fact, the licensed premises are not a restaurant within the aforesaid definition of same.

It is our opinion, therefore, that premises licensed for the sale of alcoholic liquor for consumption upon the licensed premises are not exempt from the requirement of Article VI, Section 20 of the Illinois Liquor Control Act for a clear view from the public way, merely by reason of the fact, that said licensed premises also possess a food dispenser’s license. In order to be so exempted, the licensed premises must fall within the definition of the term “restaurant” as set forth in the Illinois Liquor Control Act.

LIQUOR COMMISSIONER’S POWER TO SUBPOENA RECORDS

(Administrative Assistant to the Mayor—M. M.—January 18, 1965)

Your letter of January 14, 1965, wherein you request an opinion as to whether or not the Mayor, in his capacity as Local Liquor Control Commissioner, has the power to subpoena the records from a public utilities company where the individual involved currently possesses a liquor license in the City of Chicago and whether such power, if it exists, can be delegated to the Chicago Police Department, has been referred to me for answer.

Chapter 43, Section 113 of the Illinois Liquor Control Act entitled “Examination of applicant for local license” provides as follows:

“The local liquor control commissioner shall have the right to examine, or cause to be examined, under oath, any applicant for a local license or for a renewal thereof, or any licensee upon whom notice of revocation or suspension has been served in the manner hereinafter provided, and to examine or cause to be examined the books and records of any such applicant or licensee; to hear testimony and take proof for his information in the performance of his duties, and for such purpose to issue subpoenas which shall be effective in any part of this State. For the purpose of obtaining any of the information desired by the local liquor control commissioner under this section, he may authorize his agent to act on his behalf.”

It appears from the above, therefore, that the Local Liquor Control Commissioner has the power to require an applicant for an original license or an applicant for renewal of his license to submit any books and records which the Local Liquor Control Commissioner may deem pertinent to his determination as to whether such application should be approved.

In regard to licensees, such power exists only after a notice of hearing or revocation proceedings has been served upon a licensee. The power to issue subpoenas does not exist in the Local Liquor Control Commissioner until such time as a revocation proceedings is instituted. At that time, subpoenas may

be issued, valid in any part of this State, for any parties, including a public utility, deemed by the Local Liquor Control Commissioner to have any information bearing upon the charges set forth in the revocation proceedings.

The Statute does not give the Local Liquor Control Commissioner power of subpoena over persons who are not licensees unless and until there is a revocation proceedings pending.

Since the Local Liquor Control Commissioner does not have the power to subpoena a public utility company in the absence of a revocation proceedings, he cannot delegate such nonexistent power. If a subpoena is issued pursuant to a revocation proceeding, then the books and records of said public utility company will be presented at the hearing before the Mayor's Deputy and the Police Department examination thereof need not be necessary.

The above quoted provision of the Statute provides for the authorization by the Local Liquor Control Commissioner of "his agent" to act on his behalf. It is not clear whether in a specific instance such as this, the Police Department can be given a blanket authorization to be able to examine books and records of applicants or licensees other than in the normal course of their investigations.

Section 111 of Chapter 43 provides that the Local Liquor Control Commissioner "may appoint a person or persons to assist him in the exercise of the powers and the performance of the duties" required of the Local Liquor Control Commissioner and that the latter term is to include "any committee or other agency" so appointed (See Section 114 of Chapter 43).

In summation, it would appear that the Local Liquor Control Commissioner does not have a subpoena power until such time as a revocation proceedings is pending, and, as is subpoena power generally, said power is limited to documents or testimony relative to said proceedings. The power when it exists, exists only in the Local Liquor Control Commissioner or someone duly appointed by him to so act.

No subpoena power is necessary for the Local Liquor Control Commissioner to examine the books and records of applicants whether for an original license or renewal of their already existing license but this power to require said books and records only exists over the applicant and does not extend to public utility companies or other private concerns and individuals. Regarding the latter, records can only be obtained upon voluntary production thereof.

REFUNDS ON LIQUOR LICENSE FEES

(Administrative Assistant to the Mayor—M. M.—January 18, 1965)

In your letter of January 14, 1965, you seek an opinion as to the propriety of the City Collector's Office granting a refund of license fees tendered with retail liquor license applications where (a) The Application for license was disapproved, and (b) The Application was approved but the applicant did not operate.

Under the provisions of Chapter 147-3 of the Municipal Code of the City of Chicago, an applicant for a retail liquor license must deposit with said application, funds sufficient to cover the cost of publication required therein and also a sum sufficient to cover the required license fee. The applicant, whether successful in obtaining a license or not, must pay the cost of publication and that amount is never refunded to the applicant.

As to the deposit for the required license fee for the period of the application, Chapter 101-9 of the Municipal Code provides for the refund to the applicant of the license fee paid in advance whenever a license is not approved

and the applicant is not engaged in the business or occupation for which the license was sought. Said refund is to be made to the applicant upon recommendation of the City Collector and the approval of the City Comptroller.

It appears therefore, that where an application for license has been disapproved, the City Collector may refund the license fee deposited in advance at the time of the filing of the application.

Where, however, an application is approved, the City Collector transmits the deposit made by the applicant in advance into the general corporate fund and no longer has control over said deposit.

In order for a successful applicant who has not operated said business to obtain a refund of his license fee, he must apply to the City Council of the City of Chicago for said refund. The City Council, through its appropriate committee, will cause its own investigation to be made as to whether or not said applicant did or did not in fact, operate and will then take action as to whether the applicant is entitled to a refund or not. The City Collector has no authority to refund any money to an applicant whose application has been approved. This can only be done by appropriate action and order of the City Council of the City of Chicago.

SEPARATE PORTIONS REQUIRE SEPARATE LICENSES

(Director, Vice Control Division, Department of Police—M. M.—February 1, 1965)

Your letter of November 30, 1964, wherein you request an opinion as to a determination if a draw curtain as indicated on the attached diagram of the premises creates a separate room or enclosure which would require a second City of Chicago Retail Liquor License for said premises, has been referred to me for response.

Section 11 of Article VII of Chapter 43, Ill. Rev. Stats. (Liquor Control Act) requires "separate licenses for each premises."

The application of this provision of the Illinois Liquor Control Act naturally depends upon the specific circumstances and facts relative to the physical description of the premises in question. Many opinions have been written by this office, some wherein it was determined that only one license was necessary and others wherein it was determined that one license would not be sufficient under the given set of facts.

Based upon your description of the premises and the diagram attached to your letter of November 30th, it appears that the draw curtain in question completely divides the subject premises into two distinct and separate portions, each portion having its own bar, tables and chairs, and mens and womens washrooms.

It would appear therefore that two licenses would be required for these premises. Kept in mind, however, should be the provisions of the Illinois Statutes relative to unobstructed view and whether or not the back portion would comply therewith.

As to your question of whether the operation of a restaurant at a separate but connecting location at 2537 S. Pulaski entitles the operator of the tavern at 2541 S. Pulaski to keep open for food business 24 hours a day, please be advised that: If the premises at 2541 S. Pulaski Road has a food license to cover those premises, the said establishment can remain open to serve food 24 hours a day. However, no alcoholic liquor may be sold between the hours of the expiration of their liquor license and 7:00 A. M.

Section 147-13 of the Municipal Code of the City of Chicago prohibits the sale or giving away of alcohol between the hours of 2:00 A. M. or 4:00 A. M., as the case may be, and 7:00 A. M. in the morning. There is no provision about the premises being open. It is the dispensing of alcohol during those hours which is prohibited.

SALE OF "NEAR BEER"

(Director, Vice Control Division—M. M.—February 9, 1965)

Your letter of December 14, 1964 and the report of Chemist Joseph R. Zak of the Chicago Police Department Crime Laboratory Division attached thereto, wherein you request an opinion as to whether a license is required for the dispensing of a malt beer, "Jet Near Beer", which has a content of .27 alcohol, has been referred to me for reply.

Chapter 43, Article I, Section 95.05 of the Illinois Revised Statutes (Liquor Control Act) provides as follows:

"... the provisions of this Act shall not apply . . . to any liquid or solid containing $\frac{1}{2}$ of 1% or less of alcohol by volume."

It would appear therefore, that based upon the aforementioned laboratory report and the above quoted provision of the Act that no retail liquor license would be required to sell this product.

SERVICE REQUIRED FOR LICENSE REVOCATION

(Director, Vice Control Division—M. M.—November 29, 1965)

Your inquiry of November 17, 1965 as to "legal service" on a licensee of Notice of Hearing in proceedings to revoke a liquor license directed to the corporation counsel has been referred to me for answer.

"... no such license shall be so revoked or suspended except after a public hearing by the local liquor control commissioner with a 3 day written notice to the licensee affording the licensee an opportunity to appear and defend . . ."

Such service need not be made personally, but can be left on the licensed premises with someone in authority, i.e., a manager, bartender or clerk. It is questionable if a waitress or porter can be considered in sufficient authority to accept notice on behalf of the licensee.

Should the licensed premises be closed, substituted service may be accomplished by posting a copy of the notice on the door or window of the licensed premises, forwarding another copy by registered mail to the last known address of the licensee.

As to computation of time, Chapter 100, Section 6 (Ill. Rev. Stat. 1965) provides as follows:

"In computing the time for which any notice is to be given, whether required by law, order of court or contract, the first day shall be excluded and the last day included, unless the last day is Sunday, and then it also shall be excluded."

DENIAL OF SERVICE

(Lieutenant of Police—R. S. M.—February 7, 1966)

Your letter dated January 6, 1966, addressed to the Corporation Counsel, has been forwarded to this office for reply.

In your letter you state that two white youths, having identification which indicated their respective ages to be 21 and 22 years, entered a bar. Upon requesting service, they were refused on the basis of a management policy which was manifest by a sign posted therein reading: "We will not serve anyone under 25 years of age."

You ask (1) whether refusal of service on the basis of the sign requiring a minimum age in excess of 21 is "legal"; (2) whether the youths, allegedly 21 years of age, had a "legal grievance" against the licensee on the basis of refused service; and (3) whether there is "legal recourse" for said youths by way of "filing a complaint"; and if so, where will it be heard?

Section 133 of the Illinois Liquor Control Act (Ill. Rev. Stat. 1965, Ch. 43, par. 133) defines civil rights in the licensed premises and states as follows:

"No licensee licensed under the provisions of this Act shall deny or permit his agents and employees to deny any person the full and equal enjoyment of the accommodations, advantages, facilities and privileges of any premises in which alcoholic liquors are authorized to be sold subject only to the conditions and limitations established by law and applicable alike to all citizens."

Section 131 of the same Statute (*cited supra*) points out the legal duties of the licensee or his agent with respect to service and states in part:

"No licensee nor any officer, associate, member, representative, agent or employee of such licensee shall sell, give or deliver alcoholic liquor to any person under the age of 21 years, or to any intoxicated person or to any person known by him to be an habitual drunkard, spendthrift, insane, mentally ill, mentally deficient or in need of mental treatment . . ."

Inasmuch as Section 133 of the Act (*cited supra*) clearly states that no person shall be denied the enjoyment of the accommodations, advantages, and like privileges of any premises licensed under said Act, "subject only to the conditions and limitations established by law", it appears that these "conditions and limitations" are only those reasons expressly set forth in Section 131 of the Act (*cited supra*). Therefore, no licensee or agent thereof may arbitrarily deny service to any person over the age of 21 years, save the other conditions stated in Section 131, regardless of the merit of said licensee's policy.

Accordingly, an arbitrary age limitation set by a licensee beyond the age of 21 years is contrary to the above-cited provisions of the Illinois Liquor Control Act, cannot be supported in law and is therefore illegal.

Questions (2) and (3) contained in your communication relate to the "legal recourse" available to one who has a "legal grievance" by reason of the refused service. Since the law Department of the City of Chicago is precluded by law from advising private parties as to their individual rights, it is suggested that such persons consult their own attorneys with respect to such rights as they may have.

BARMAID

(J. D.—M. M.—March 8, 1966)

Your recent communication to the Honorable Richard J. Daley, Mayor of the City of Chicago, wherein you ask what the law is for a woman of twenty-eight to help her husband tend bar in their place of business, has been referred to me for reply.

The Illinois Liquor Control Act permits cities in Illinois to prohibit barmaids, i.e., women from pouring, drawing or mixing alcoholic liquor, on the licensed premises, except if the woman is the licensee, or bears certain close relationships to the licensee.

Chapter 147-15 of the Municipal Code of Chicago prohibits any female from drawing, pouring or mixing alcoholic liquor on the licensed premises unless she is the licensee, or the mother, daughter, wife or sister of the licensee.

It is unfortunate that you do not reside in Chicago. If you did, you and/or your husband could obtain a license in your individual names and you could tend bar.

Since you do not reside in Chicago, the only way you could get a City of Chicago Retail Liquor License is by way of forming a corporation, which you have done.

By so doing, however, the corporation is in fact the licensee, and it is impossible, both physically and legally, for a corporation to have a mother, daughter, wife or sister. By reason thereof, you are, therefore, prohibited from tending bar on the licensed premises.

Although this seems grossly unfair to you, as you so indicate in your letter, it is the law and I am sure you understand and appreciate the position of the Mayor and the police department in their duty and responsibility to uphold and enforce the law.

MANAGER'S STATEMENT

(Administrative Assistant to the Mayor—M. M.—April 1, 1966)

Your recent request for an opinion as to under what circumstances a Manager's Statement should be filed in connection with a Liquor License Application has been forwarded to me for reply.

Section 120(10) of Chapter 43, Ill. Rev. Stat., 1965, provides, in part, as follows:

"No license of any kind . . . shall be issued to a corporation, if any officer, manager or director thereof, . . . would not be eligible to receive a license hereunder for any reason other than citizenship or residence within the political subdivision."

Section 120(11) of the same Act provides, as follows:

"No license of any kind . . . shall be issued to a person whose place of business is conducted by a manager or agent unless said manager or agent possesses the same qualifications required of a licensee."

The above cited provisions require, therefore, that no license may issue until an investigation has been made of a "manager", and said party is found not to be disqualified.

There is no specific definition of the term "manager" contained in the Liquor Control Act, and, therefore, definition must be found elsewhere.

Webster defines "manager" as one who "directs affairs", "controls"; "is in charge".

Black's Law Dictionary defines "manager" as "one who has charge of corporation and control of its business or branch establishment, and is vested with a certain amount of discretion and independent judgment"; "a person chosen or appointed to manage, direct or administer the affairs of another person or of a corporation or company."

It would appear, therefore, that whenever any person other than the individual applicant or applicants, as the case may be, or the corporate officers set forth on a corporate application is going to operate the licensed premises in a manner as set forth in the above cited definitions, a Manager's Statement should be filed in order that said person may be investigated as to his qualifications, or lack thereof, as required by Sections 120(10) and 120(11) of the Illinois Liquor Control Act.

Returned herewith is your file in this matter.

APPLICANT WITH CHARGES PENDING

(Administrative Assistant—R. S. M.—May 6, 1966)

Your request of March 14, 1966, addressed to the Corporation Counsel for an opinion regarding the above application, has been forwarded to me for reply.

The police report attached to and contained on the application indicates that the applicant is a recently formed corporation whose officers are the same as those of a currently licensed corporation. The premises sought to be licensed by the applicant corporation are the premises currently licensed by the old corporation. The applicant corporation was formed subsequent to an assessment by the Department of Revenue of the State relative to alleged sales tax arrears in the amount of \$5,629.30, though this assessment has been contested by the old corporation and is presently pending before a Department hearing officer.

The Illinois Liquor Commission has not and will not seek revocation of the state license until a final determination has been made fixing the precise amount of sales taxes due and owed the state by the debtor corporation. The police report further indicates that while the corporate officers are of apparent good character to qualify the applicant for a license, disapproval was recommended on the grounds that no corporate minutes were submitted so as to indicate a disposition of the ownership of stock in the applicant corporation and because the alleged sales tax liability is still pending against the former corporation. The investigating officer also reported that the applicant concealed the tax matter involving its predecessor corporation, its officers stating that "personal reasons" necessitated the change. In addition, no provision has been made by the old corporation in its transfer of assets to the applicant whereby the tentative tax liability is to be assumed by the applicant corporation.

Section 120 a of the Illinois Liquor Control Act (Ill. Rev. Stat., 1965, Ch. 43, par. 120 a) provides in part as follows:

"In addition to other grounds specified in this Act, the State Commission or the local liquor control commissioner, on complaint of the Department, may refuse the issuance or renewal of a retailer's license, or suspend or revoke such license, for any of the following violations of the 'Retailer's Occupation Tax Act', approved June 23, 1933 as amended:

". . .

"3. Failure to pay all or part of any tax or penalty finally determined to be due . . .

". . .

"6. Wilful violation of any rule or regulation of the Department relating to the administration and enforcement of tax liability."

While it would appear that a contested sales tax assessment not yet determined is insufficient ground for the denial of a license application since a complaint must first be issued by the Department of Revenue, nevertheless it may be that the applicant herein has wilfully violated "any rule or regulation of the Department" by reason of its formation and receipt of assets from its predecessor at a time when a possible sales tax liability is pending against the latter. However, it is not the applicant which is indebted to the State and the officers of the former corporation are not disqualified from holding a license until such time as the existing license is revoked as set forth in Section 120a of the Liquor Act. Further, a tax liability to the State is not shielded by corporate structure but follows individual officers and employees of the corporation, becoming their personal liability in accord with the Illinois Revenue Act (Ill. Rev. Stat., 1963, Ch. 120, par. 452½). The issuance of a license to the applicant would in no wise bar subsequent revocation or refusal to renew that license once there has been a final determination of the sales tax liability against the former corporation and the "Department" has filed a complaint with the Local Liquor Control Commissioner.

Section 113 of the Liquor Control Act provides in part:

"The local liquor control commissioner shall have the right to examine, or cause to be examined, . . . any applicant for a local license, . . . and to examine or cause to be examined, the books and records of any such applicant . . ."

It appears that the applicant corporation has not complied with the above in that it has not produced its books and records for examination.

In the light of all of the above, it would appear that while the pending sales tax liability of the licensed corporation is not of itself proper grounds upon which to deny the subject application, it is recommended that this application not be approved until such time as the applicant produces its books and records and the examination thereof indicates no disqualifying features as evidence of an attempt by the applicant to escape the possible tax liability of its officers.

Returned herewith is your file in this matter, including the attached application.

Section B. STATE, PUBLIC VEHICLE AND DRIVER'S LICENSES

TAXICAB REQUIREMENTS FOR LICENSE

(Town Attorney, Town of Cicero—E. V. H.—January 30, 1961)

Your letter of January 25, 1961, asking whether the taxicab ordinances of the City of Chicago provide for restriction on the age of automobiles used for taxicab purposes, has been referred to this office.

Ordinances relating to taxicabs are contained in Chapter 28 of the Municipal Code of Chicago. There is no specific ordinance restricting the age of automobiles which may be used for taxicab purposes. However, the Code does contain the following provisions which enable the Public Vehicle License Commissioner to regulate the quality and condition of the vehicles used as taxicabs:

28-5. Application.) Under this provision all applications for taxicab license must indicate "the manufacturer's name, model, length of time in use, horsepower and seating capacity of the vehicle which applicant will use." It further requires that the color scheme be registered with the Public Vehicle License Commissioner.

28-6. Investigation and issuance of license.) In the course of investigation of an applicant, it is the duty of the Public Vehicle License Commissioner to determine "the financial ability of the applicant to render safe and comfortable transportation service [and] to maintain or replace the equipment for such service * * *."

28-14. Suspension of license.) "If any public passenger vehicle shall become unsafe for operation or if its body or seating facilities shall be so damaged, deteriorated or unclean as to render said vehicle unfit for public use, the license therefor shall be suspended by the commissioner until the vehicle shall be made safe for operation and its body shall be repaired and painted and its seating facilities shall be reconditioned or replaced as directed by the commissioner. In determining whether any public passenger vehicle is unfit for public use the commissioner shall give consideration to its effect on the health, comfort and convenience of passengers and its public appearance on the streets of the city."

28-15.1. Discretionary Revocation of License.) This provision empowers the Public Vehicle License Commissioner to recommend to the Mayor revocation of any taxicab license for violation of the provisions of Chapter 28 or of the rules and regulations of the Commissioner relating to the administration and enforcement of this chapter.

Chapter 21.2 of the Municipal Code empowers the Public Vehicle License Commissioner "to adopt such orders, rules and regulations as he may deem expedient for the proper administration and enforcement of the provisions of this Code and ordinances governing public chauffeurs and public passenger vehicles and their operation."

It is our opinion that, despite the absence of a specific ordinance, the foregoing provisions of the Municipal Code vest discretionary power in the Public Vehicle License Commissioner to restrict the age of automobiles used for taxicabs.

PROCESSING CHAUFFEUR LICENSE

(Public Vehicle License Commissioner—J. O. T.—May 12, 1961)

Your letter of April 19, 1961 sought an answer to the question of whether or not it would be permissible for the Public Vehicle License Commissioner to process city chauffeur license applications after that office had received finger print records from the FBI and the B. Of I. The answer to this question is "No". Prior to the issuance of the licenses by the Public Vehicle License Commissioner:

"The character and reputation of each applicant shall be investigated under the supervision of the captain of the police district in which the applicant resides, and a report of such investigation containing any facts relevant to the character and reputation of the applicant shall be forwarded by the captain to the commissioner of police, who shall forward the same to the commissioner together with his recommendation. If the commissioner shall be satisfied that the applicant is of good character and reputation and is a suitable person to be entrusted with driving a public passenger vehicle he shall issue the license. Pending such investigation the commissioner may issue a temporary permit authorizing the applicant to drive a public passenger vehicle until the time designated in such permit. If the investigation is not completed by that time the commissioner may, in his discretion, extend the time of such permit until such further time as in the opinion of the commissioner the investigation can be completed." Section 28.1-4 Municipal Code of Chicago.

The above ordinance indicates that processing of applications for licenses by the Commissioner's office after such office receives the finger print records from the FBI and the Local B. of I., cannot be done unless the requirements of the above ordinance are met.

On April 12, 1961, the superintendent of police issued Department General Order No. 61-31 which pertained to license investigations. The order in question transferred the duties and responsibilities of individual police district license officers to the Organized Crime Division. The Organized Crime Division, therefore, now has complete responsibility for investigation and processing of licenses which previously had been performed by the police district. The General Order further states that the only exception to this new procedure is that "applications for license to operate a public vehicle will be handled entirely by the Public Vehicle Commission and will not be processed by the Organized Crime Division". Prior to the General Order, such applicants were investigated at the local police district in which the applicant lived. Insofar as this order pertains to the processing and investigation of licenses to operate a public vehicle it is in direct conflict with Chapter 28.1-4 of the Code.

In summary, it is the opinion of the undersigned that the Public Vehicle License Commissioner and the Superintendent of Police both must follow the requirements laid down in Section 28.1-4, and therefore the investigation of the character and reputation of each applicant must be made in the local police district in compliance therewith, and the public vehicle License Commissioner cannot make this investigation himself or issue licenses without having such investigation made.

TRANSFER OF LIVERY LICENSE

(Public Vehicle License Commissioner—R. A. P.—November 22, 1961)

In answer to your request for an opinion regarding the transferability of a livery license upon the death of the licensee, it is our opinion that such a transfer is provided for in section 28-9 of the Municipal Code.

Section 28-1 of the Municipal Code provides the following definition: "‘Public passenger vehicle’ means a motor vehicle as defined in the Motor Vehicle Law of the State of Illinois, [Ill. Rev. Stats. 1961, Ch. 95½, § 1-133] which is used for the transportation of passengers for hire excepting those devoted exclusively for funeral use or in operation of a metropolitan transit authority or public utility under the laws of Illinois." "Livery Vehicle" as defined by Section 28-1 of the Code "means a public passenger vehicle for hire only at a charge or fare for each passenger per trip or for each vehicle per trip fixed by an agreement in advance. In view of the above definitions "livery vehicle" plainly falls within the larger term "public passenger vehicle".

Section 28-9 provides for the assignment of public passenger vehicle license upon the death of the licensee subject to certain restrictions and qualifications provided in that section.

While Section 28-19 provides, in part, that no license for any livery vehicle shall be issued except in the annual renewal of such license or upon certain other conditions, it is our opinion that Section 28-19 is intended to restrict the total number of livery licenses rather than prohibit the assignment of a validly issued license.

AIRPORT BUS TRANSPORTATION

(Commissioner, Department of Aviation—R.B.K.—December 8, 1961)

We acknowledge receipt of your recent letter wherein you request our opinion as to whether accomodation buses operated by various hotels and motels between the airport and the place of lodging as a service to their patrons are subject to permit requirements of the Chicago Municipal Code in each of the following instances:

1. The bus service is rendered for a fee;
2. The bus service is rendered without charge.

Be advised that it is our opinion that the provisions of Chapter 37-13.3 apply in both instances. If the seating capacity of the passenger vehicle exceeds five passengers and use of the airport driveway facilities is made in transporting passengers between the motels or hotels and the airport, the operator is required to secure a permit from the Commissioner of Aviation for each trip.

In the first instance the bus service rendered for a fee falls within the definition given to "public passenger vehicle" in Chapter 28-1 of the Municipal Code. It is therein defined as "a motor vehicle which is used for the transportation of passengers for hire."

In the second instance the bus service rendered without a fee falls within the "for hire" requirement. The cases indicate, either by direct

holding or by recognition, that where the relationship between the operator and passengers is one of business and the transportation is supplied in pursuit thereof for their mutual benefit, compensation has been given and the occupants are passengers for hire and not guests. *Swink v. Gardena Club*, 65 Cal. App. 2d 674, 151 P. 2d 313. In *Howes v. Kelman*, 326 Mass. 696, 96 N. E. 2d 394, the court said: "One does not lose his status as a passenger for hire and become a gratuitous passenger if the benefits accruing to the driver from the transportation are not of a pecuniary nature but are in the form of some advantage other than associated with mere companionship or social intercourse."

In considering the relationship of the hotel to the intended patrons the benefit accruing to the hotel is the inducement to prospective patrons to obtain accommodations at the hotel rather than elsewhere. This transportation is in connection with and in furtherance of the hotel's business. It is for a business and not a social purpose. In *Dirksmeyer v. Barnes*, 2 Ill. App. 2d 496, 119 N. E. 2d 813, the court said that "where, however, the relationship has a business aspect, as distinguished from a social one, which promotes the mutual interests of both the person carried in the motor vehicle and the driver, or where the driver receives a tangible benefit monetarily or otherwise, which is the motivating influence for furnishing the transportation the rider is a passenger."

On the basis of the foregoing, we conclude that in both instances the permit requirements of Chapter 37-13.3 of the Municipal Code apply to the accommodation bus service.

CHAUFFEUR'S LICENSE—REVOCATION

(W. W. McKenna—E. W. P.—January 26, 1962)

We are returning correspondence relative to recommendation for revocation of City Chauffeur's License No. 7222 issued to Charles E. Hill, 6931 S. Sangamon. You request the benefit of our opinion regarding the recommendation for revocation made by Hon. James Y. Carter, Commissioner, Public Vehicle License Commission.

We have reviewed all of the attached correspondence from Patrick M. Laughran, Lieut. Commanding, Vehicle Unit, and the questions and answers propounded to Charles E. Hill and other participants. The Lieut. Commander recommends revocation and Commissioner Carter concurs in the recommendation. In addition to Section 28.1-12 of the Code which Commissioner Carter cites the pertinent section referring to suspension and revocation is contained in 28.1-10 which reads as follows:

"If any chauffeur shall violate any traffic laws or regulations or any order, rule or regulation of the commissioner relating to the administration and enforcement of the provisions of chapter 28 of this code or of this chapter, the commissioner may suspend the chauffeur's license for a period not to exceed thirty days.

"If any person has obtained a public chauffeur's license by application in which any material fact was omitted or stated falsely, or if any chauffeur shall become unfit to operate a public passenger vehicle on account of any infirmity of body or mind or because of addiction to the use of drugs or intoxicating liquors or if any chauffeur shall borrow or hire a public passenger vehicle for independent operation in the transportation of passengers for hire, or shall use any public passenger vehicle in his possession or control in violation of any ordinance governing the operation thereof or shall violate any criminal law which would disqualify any applicant for a chauffeur's license, or any of the provisions of chapter 28 of this code or of this

chapter, the commissioner may recommend to the mayor that his license shall be revoked and the mayor, in his discretion, may revoke such license. Upon suspension or revocation of a public chauffeur's license, the licensee shall surrender his license certificate to the commissioner." (Italics supplied.)

The section relating to suspension not to exceed thirty days relates to violation of traffic laws or regulations and orders, rules or regulations of the Commissioner. The section relating to revocation relates to the subject matter of this complaint and findings. In view of the evidence and the determination of the Commanding Lieut. of the Vehicle Unit and the Commissioner, it is our opinion that the Chauffeur's License of Mr. Hill should be revoked.

ASSIGNABILITY OF PUBLIC PASSENGER VEHICLE LICENSE

(Public Vehicle License Commissioner—R. A. P.—April 30, 1962)

Your letter of March 23, 1962 to Mr. Melaniphy regarding the assignability of public passenger vehicle licenses, has been referred to the writer for reply.

Your letter indicates that Alan Sellers, holder of Public Passenger Vehicle License No. 5248, died on March 30, 1961. At that time, the city ordinance regulating the assignment of licenses restricted assignments to only natural persons. Pursuant to this ordinance, Sellers' widow assigned said license to herself.

Subsequent to the above assignment, the Supreme Court of Illinois, in *Yellow Cab Co. v. City of Chicago*, 23 Ill. 2d 453, at page 464, stated:

"Since the provisions in the ordinance which restrict assignability denied unreasonably equal protection of the law to corporations, these provisions are unconstitutional."

In view of this recent decision, Mrs. Sellers now seeks to rescind the assignment to herself and to assign the license to a corporation.

Following the above mentioned decision in *Yellow Cab Co. v. City of Chicago*, the appropriate sections of the Municipal Code were amended so as to eliminate those restrictions on assignability which the Supreme Court found unconstitutional.

In light of the Court's decision and the subsequent amendment of the city ordinance, it is our opinion that Mrs. Sellers should be allowed to rescind her prior assignment and assign the license to a corporation.

TAXICAB INSURANCE

(Public Vehicle License Commissioner—R. A. P.—June 21, 1962)

Your inter-office communications of June 5, 1962 and June 18, 1962 concerning sample insurance contracts for taxicabs have been forwarded to the writer for reply. The following remarks are directed specifically to the substitute contract attached to your memorandum of June 18, inasmuch as you requested that this contract be substituted for the original sample contract attached to your memorandum of June 5th.

In our opinion, the sample insurance contract is not acceptable to the City of Chicago and is inconsistent with the terms of Sec. 28-12 of the City ordinance for the following reasons:

1. Section 28-12 of the Code provides, inter alia, that the insurance contract, "shall contain a description of each public passenger vehicle insured, the manufacturer's name and number, the state license number, and the public passenger vehicle license number." This identification by description, of each and every vehicle to be insured is not provided for in the sample contract.
2. In addition to the basic insurance coverage required of seven passenger vehicles, Sec. 28-12 requires additional insurance coverage for each vehicle having seating capacity for more than seven adult passengers. This additional insurance amounts to at least five thousand dollars additional coverage for each such additional passenger capacity over the seven passenger limitation. Item 6 of the sample contract which pertains to the maximum liability of the company neither specifically limits operations to seven passenger vehicles nor does it provide for the requisite additional insurance for passenger capacity over the seven passenger limit.
3. Item 7 of the sample contract which pertains to the limit of Assured's retention provides basically, that the assured should bear the first \$15,000 for one person injured or killed. This type of provision is commonly referred to as a deductible clause and Section 28-12 does not provide for deductible clauses but rather requires complete coverage. While your inter-office communication advises me that this contract should be considered "as an excess contract above a satisfactory underlying bond", this sample contract is conditioned upon other arrangements of which we have no knowledge. Standing alone, this contract does not meet the requirements of Section 28-12 of the Code.
4. Section I of Item 9 limits the company's liability to accidents "caused by or growing out of the actual operations of the Assured . . ." Section 28-12 provides that the insurance shall cover ". . . any final judgment rendered against the cabman or coachman and person insured, or any person driving any insured vehicle . . ." It is our opinion that the sample contract limiting liability to accidents growing out of the actual operations of the insured is narrower in scope than that portion of Section 28-12 which provides for liability as pertains to any person driving any insured vehicle. Conceivably, accidents might occur involving any person driving any insured vehicle and the interested parties might deny liability, basing their denial on the contention that the accident did not grow out of the actual operation of the insured.
5. Section VII of Item 9 provides in part, that "Proof of payment by the Assured of its full liability, shall be a condition precedent to any or all liability against Underwriters under this contract except in the event of bankruptcy or insolvency of the Assured." Our interpretation of the provisions of Section 28-12 of the Code does not permit insurance coverage to be dependent upon this type of condition precedent.
6. Section XIV, Item 9 provides that this insurance contract may be cancelled at any time, by either of the parties upon thirty days written notice to the other party. Section 28-12 of the Code provides in part, ". . . No insurance or bond shall be subject to cancellation except on thirty day's previous notice to the Commissioner. Section XIV is not in compliance with the Code because it does not provide for the mandatory notice to the Commissioner."

Among its other requirements concerning insurance, Section 28-12 of the Code provides that the requisite insurance shall be placed with ". . .

a solvent and responsible insurer approved by the Commissioner, authorized to transact such insurance business in the State of Illinois, and qualified to assume the risk for the amounts hereinafter set forth under the laws of Illinois . . .” It should be pointed out that unless and until the Commissioner approves the insurer, the insurance contract is not in compliance with the Code.

While the foregoing seem to be the principal objections to the proposed sample insurance contract from a practical point of view, it is impossible for us to make a complete and final determination of its acceptability since the sample contract is in draft form, blank spaces are unfilled, handwritten words complete other portions of the otherwise typewritten sample and certain portions of the typewritten copy have been stricken over by handwriting. Also, this memorandum is specifically not intended to constitute any approval of subsequent efforts to correct our specific objections as noted above, by a rewriting of the pertinent provisions.

MOBILE FOOD DISPENSERS

(Alderman 5th Ward—R. N.—June 22, 1962)

In reply to your request for an opinion from this department on two questions concerning mobile food dispensers, we submit the following:

1. Q. Does the ordinance which prohibits peddling in specified districts (and my particular interest is in the prohibited areas within the fifth ward) also prohibit peddlers of food or drink in such areas by “mobile food dispensers”?

A. The ordinance to which the question refers is section 160-13 of the Code which was passed in 1939. It is a provision of chapter 160 which sets out requirements for the licensing and regulating of peddlers, as defined therein. It specifically designates:

“No one *having a peddler's license* shall peddle any merchandise or any other article or thing whatsoever, at any time, within districts which have been or shall be hereinafter designated by the city council.” (Italics ours.)

In 1960 an ordinance was passed licensing and regulating mobile food dispensers, as defined therein. These requirements are contained in sections 130-15.1 to 130-15.20 of the Code. That the regulatory provisions as a whole of chapter 160 were not regarded as applicable to licensees as mobile food dispensers licensed under these sections of chapter 130 is evidenced by the provisions contained in the second paragraph of section 130-15.2 which reads:

“Nothing in this section shall be construed to prohibit the sale of fish, fruits, vegetables or country produce from a vehicle or otherwise, as set forth in sections 160-1 and 160-2 of this code pertaining to peddlers.”

It is significant that specific reference is made to a particular section of the peddlers' ordinance when its provisions were deemed desirable to be applied to mobile food dispensers. This, together with the clear language of the prohibition in section 160-13 that “No one *having a peddler's license* * * *” shall peddle in a no-peddling district, leads us to the conclusion that licensees as mobile food dispensers are governed, with the single exception above noted, by the provisions of the ordinance licensing and regulating that occupation, and not provisions regulating licensees under the ordinance licensing and regulating peddlers.

Were the intention otherwise, it would be a simple matter to incorporate the restriction against sales in no-peddling districts by similar reference.

2. Q. Does the provision of the ordinance in 130-15.15 that "stops are to be made only to service customers, and should not exceed thirty minutes in duration," supersede the traffic code provisions on the parking of trucks? or do the traffic code provisions on the parking of trucks prevail, including the provision against the parking of trucks in residential areas?

A. The provisions of the Traffic Regulations to which the question refers is section 27-319. It reads, in part, as follows:

27-319. No person shall stand or park any truck * * * on any residential street for a longer period than is necessary for the reasonably expeditious loading or unloading of such vehicle * * *.

No person shall stand or park any truck * * * on any business street in the city for a longer period than sixty minutes or for such time as is necessary for the reasonably expeditious loading or unloading of such vehicle * * *.

Section 130-15.15 relating to parking by mobile food dispensers reads, in part:

Mobile food dispenser vehicles shall not be operated in a fixed location and shall move from place to place upon the public ways. Stops are to be made only to service customers and should not exceed thirty minutes in duration.

These sections do not appear to be incompatible. Section 130-15.15 appears to us merely as a further restriction on trucks of mobile food dispensers, limiting their parking not only to the period necessary for the reasonably expeditious loading or unloading without maximum limit prescribed by the Traffic Regulations, but to a period specifically limited in the case of residential streets to thirty minutes, and specifically reducing the limit allowed by the Traffic Regulations on business streets from sixty to thirty minutes.

We believe the above covers the scope of your inquiry.

EXTENSION OF POLICE POWER

(Public Vehicle License Commissioner—J. J. T.—July 26, 1962)

In your letter of July 6, 1962, you indicate that you are contemplating the appointment to your staff of a police officer who, while on leave of absence, will be assigned to an investigatory and enforcement position with respect to the "Public Passenger Vehicles" ordinances of Chapter 28 of the Municipal Code of Chicago. You request our opinion as to whether you, as Public Vehicle License Commissioner, can extend to this individual all the present authority he has as a policeman necessary to enforce the provisions of said Chapter 28, and what steps you must take to grant such authority.

The extension of police powers to other than active members of the Police Department can be found in various ordinances of the Municipal Code:

Section 21-22—Employees of the Athletic Commission;

Section 8-42—Employees of the Bureau of Parks and Recreation;

Section 8.2-3—Employees of the Department of Aviation;

Section 11-21—Harbor Police and Bridge Tenders;

Section 11-22—Members of Humane Societies;

Section 173—Persons hired to guard or protect persons or property, known as "Special Policemen."

It is to be noted concerning these various grants of authority that, in every instance, the individual to whom police power is to be given must be appointed or sworn in by the Superintendent of Police. It requires an act of the Superintendent to effect such a grant.

However, this condition is not present in the case of your office. Section 21-1 reads:

"There is hereby created the office of public vehicle license commissioner who shall be in control of the administration and enforcement of provisions of this code and all ordinances relating to public passenger vehicles. He shall be appointed by the mayor, by and with the advice and consent of the city council."

The powers granted to your office are contained in Section 21-2.

". . . He shall have power to adopt such orders, rules and regulations as he may deem expedient for the proper administration and enforcement of the provisions of this code and ordinances governing public chauffeurs and public passenger vehicles and their operation. Notice of every such order, rule and regulation shall be given to all persons affected.

The commissioner and such assistants as he may designate shall have all the powers of policemen necessary to enforce said provisions of the code and ordinances."

It is thus apparent that an act of appointment by yourself is all that is necessary to invest an employee of your department with police power.

That this power is not a full and absolute one is seen by the limitations contained in the phrase, "necessary to enforce said provisions." The police power is limited to those ordinances governing public chauffeurs and public passenger vehicles, which are presently set forth in Chapter 28 of the Municipal Code. However, within that limited scope of duty, he would possess, "all the powers of policemen."

It thus makes no difference whether he was a former active police officer or not. His leave of absence terminates the police power he held while a member of the force, and his appointment to the position you contemplate invests him anew with a limited police power.

As to your question concerning the steps to be taken to effect this appointment may we suggest that you reduce the appointment to writing and furnish the Superintendent of Police with a copy of same. A badge of authority should be issued under the provisions of Section 25-11 of the Municipal Code.

EFFECTIVE DATE OF TAXICAB CODE

(President, Yellow Cab Company—J. C. M.—July 8, 1963)

In reply to your request as to the effective date of the amendments to the Taxicab Code provisions passed at the meeting of the City Council on July 1, 1963, be advised that under the provision of Chapter 24, Section 1-2-4, the effective date will be ten (10) days after July 11, 1963. when

the Council Journal of the meeting of July 1, 1963 will be approved. That constitutes publication under the Statute. Since the Code amended provides for fines, the ordinance does not become effective until ten (10) days thereafter.

ASSIGNABILITY OF LIVERY LICENSE

(Public Vehicle License Commissioner—M. M. M.—August 22, 1963)

Your letter of July 23, 1963 requesting as to whether or not livery licenses are assignable as are taxicab licenses, pursuant to Chapter 28 of the Municipal Code of the City of Chicago, has been referred to the writer for reply.

On July 1, 1963 the City Council amended Chapter 28-9.1 of the Municipal Code of the City of Chicago to read as follows:

"The licenses and the rights and privileges herein granted shall be assignable provided that before any such assignment shall become effective the Commissioner shall find that the assignee is qualified to comply with the terms and conditions of this ordinance and has undertaken to become liable for all of the liabilities of the assignor arising out of the operation of the *taxicab*, the license of which is so assigned. . . ." (Emphasis supplied.)

Chapter 28-9.1 further states:

"In determining whether a proposed assignee is qualified the Commissioner shall take into consideration: (a). . . .

"(d) The color scheme proposed for use to prevent deception or confusion as to the ownership of the *taxicab employed*. . . ." (Emphasis supplied.)

The language of the ordinance as quoted above indicates a clear intention to limit the assignability to only taxicab licenses as shown by the restrictive use of the word "*taxicab*" without reference to any other public passenger vehicle. Therefore Chapter 28-9.1 of the Municipal Code of the City of Chicago does not provide for the assignment of livery licenses, only for the assignment of taxicab licenses.

Further, Chapter 28-19 provides in part as follows:

"No license for any livery vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that license unless, after a hearing, the Commission shall determine that Public Convenience and Necessity require additional livery service and shall recommend to the Council, the maximum number of such licenses to be authorized by ordinance".

The above quoted language would prohibit the Public Vehicle License Commissioner from issuing a livery license to any assignee.

Since Chapter 28-9.1 pertains to taxicabs only and does not provide for the assignment of livery licenses and the Public Vehicle License Commissioner is prohibited from issuing any livery licenses except in accordance with Chapter 28-19 of the Municipal Code of the City of Chicago, we are of the opinion that livery licenses are not assignable.

HORSE DRAWN CABS

(Public Vehicle License Commissioner—J. O. T.—September 26, 1963)

In response to your inquiry of recent date, it is our opinion that the Public Vehicle License Commission has no legal responsibility for the licensing or regulation of horse drawn cabs or their drivers in the absence of an ordinance conferring such authority. The Commission, therefore, has no legal responsibility to create standards of financial responsibility for the owners or operators of such cabs.

Section 21-1 of the Municipal Code of Chicago gives the Public Vehicle License Commission power to enforce all ordinances relating to "public passenger vehicles". Section 21-2 gives the Commission power to adopt such orders, rules and regulations as are necessary for the enforcement of ordinances governing "public chauffeurs and public passenger vehicles". The term "chauffeur" is defined in Section 28-1 (L) as "the driver of a public passenger vehicle licensed by the City of Chicago as a public chauffeur". The term "public passenger vehicle" is defined in Section 28-1(c) of the Code as "a motor vehicle" as defined in the motor vehicle law of the State of Illinois". The Motor Vehicle Law of the State of Illinois defines a motor vehicle as "every vehicle which is propelled otherwise than by muscular power. . . ." Ill. Rev. Stat. 1961, ch. 95½, Section 1-133.

At present there are no ordinances licensing or regulating the type of vehicle in question. The City does have the power, however, to regulate these vehicles under its power to "license, tax, and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen and all others pursuing like occupations. . . ." and under its power to ". . . regulate the use of the streets". Ill. Rev. Stat. 1961, ch. 24, § 11-24-6 and 11-80-2. At the present time, however, the City has not exercised this delegated power over horse drawn vehicles except as to the wheel tax provided for in Section 29-5 of the Municipal Code of Chicago.

REQUIREMENTS FOR SELF-INSURER

(Public Vehicle License Commissioner—J. J. D.—December 19, 1963)

This is in response to your request for an opinion concerning the legality of taxicab owners acting as self insurers. Your inquiry is divided into two proposals: (1) Can a taxicab owner become a self insurer? (3) Whether the insurance requirements of the municipal code may be divided between the taxicab owner and an authorized insurance company?

We shall reply to the inquiry in the order stated above.

Before an individual taxicab owner may become a self insurer, it will be necessary to organize a separate corporation for that purpose with the charter of said corporation subject to the approval of the Director of Insurance for the State of Illinois (Director).

It would also be necessary to secure a certificate from the Director authorizing the corporation to write insurance within this State (Chap. 73, par. 733, etc. Ill. Rev. Stat. 1963).

A penalty is provided for every day insurance is written prior to the issuance of a certificate. This procedure is made necessary by the municipal

code governing the issuance of licenses which provides that a taxicab owner must furnish insurance issued by a "responsible insurer—authorized to transact such insurance in the State of Illinois" (Sec. 28-12, p. 236 (Municipal Code of Chicago)).

In reply to your second inquiry, the Code does not allow a division of liability in connection with the insurance provision. The code requires that the insurance and surety on the alternate bond provided by the code, shall be written by an authorized insurance company.

It is our opinion that the taxicab owner as described in your inquiry may not legally become a self insurer under the present provisions of the municipal code governing issuance of a license to operate a taxicab within the city limits.

REGULATION OF ARMORED VEHICLES

(Alderman, 14th Ward—C. J. O.—April 28, 1964)

Regarding your letter of January 21, 1964 wherein you requested this office to provide you with an opinion in the above matter, please be advised that the opinion will be divided into two parts. The first part shall concern itself with the authority of the City to regulate the operation and delivery method of these armored vehicles. The second part shall deal with the authority of the City to regulate the arms used by personnel of armored vehicles.

Authority of the City of Chicago to regulate the operation and delivery methods of armored vehicles. It is the opinion of the Corporation Counsel that the City of Chicago has the authority within the ambit of police power to subject the armored vehicles to the same restrictions imposed upon all motor vehicles by both the Statutes of the state of Illinois and the Ordinances of the city of Chicago. The police power of the City extends to motor vehicles subject to certain limitations. The reported cases limit local authorities from passing laws which unduly burden Interstate Commerce, a field reserved to Congress, even though exercised under the broad police powers which resides in the local authority. It has been held that negotiable instruments are within the flow of Interstate Commerce.

The city of Chicago may enforce all existing laws, including the various parking ordinances as applied to armored vehicles. The City Council may further enact laws pertaining to the time, place and manner of delivery of the contents of motor vehicles subject to the requirements that the regulation be reasonably related to the police power, and that the regulation shall not impose an undue hardship upon Interstate Commerce.

The "hardships" of the banking system which may arise under changes in the time, place and hours of delivery can only be determined in the Council hearing.

There are no State or Federal Regulations regulating these vehicles, nor are they subject to any State or Federal Agency.

Authority of the City of Chicago to regulate the personnel and armament of armored vehicles. Ch. 24, section 11-1-1, Ill. Rev. Stats. entitled "Cities and Villages Acts" authorizes cities to establish and define police and the authority of said police.

Chapter 173 of the Municipal Code of the City of Chicago authorizes the Superintendent of Police to create "special police". As of this date no personnel of any corporation engaged in the transportation of money has made an application to the superintendent to become regulated as special

police. It is submitted that personnel requirements may be spelled out in more detail under Chapter 173 of the Municipal Code of the City of Chicago.

Chapter 38, section 24-1 of the Illinois Criminal Code provides that sawed-off shotguns, i.e. those with a barrel length of less than 18 inches, and machine guns, i.e. those weapons that discharge 8 or more shots or bullets by a single function of the firing device, are prohibited. This prohibition extends to ownership, possession and use. The section also provides that tear-gas gun projectors and all other concealed weapons are prohibited from being carried or transported except by special agents employed by a railroad to perform police functions, or watchmen, while actually engaged in the performance of their duties or their employment, or commuting between their homes and places of employment (Chapter 38-24-2-4 Ill. Rev. Stats.).

It is the opinion of the Corporation Counsel that the legislative intent was that the term "watchman" shall include the armed guards of money transporting services. It then follows that these guards may possess upon their person, either concealed or unconcealed tear-gas guns, side arms and shotguns with a barrel in excess of 18 inches. However, guards or watchmen may not use machine guns or automatic weapons that discharge 8 or more shots by a single function of the firing device. There is nothing in either the State law or the ordinances of the City of Chicago which prohibits any person from carrying side arms or rifles and shotguns if these arms are not concealed.

The City Council may, however, establish a standard of care to be used by any watchman, guard or other special police officer such as a high degree of care or a reasonable degree of care, under the circumstances, with regard to the care and safety of bystanders in the immediate area.

The City Council may further establish occupational licensing requirements for special police, watchmen or guards, under Chapter 173 of the Municipal Code of the City of Chicago. These requirements may deal with the educational, physical and moral background of the persons applying under Chapter 173 of the Municipal Code of the City of Chicago.

SINGLE TRIP PERMITS

(Commissioner, Department of Aviation—M. M. M.—January 27, 1965)

Your letter of January 14, 1965 addressed to Mr. Raymond F. Simon, Corporation Counsel, has been referred to the writer for reply.

You request an opinion as to whether you may grant the Milwaukee Limousine Service, Inc. an interim authority to operate on a single-trip permit basis between various Milwaukee Cities and our two Chicago Airports and whether, if desired, to ultimately enter into a contract similar to that entered into with the Peoria-Rockford Bus Company, and whether submission to the Airlines Representative of such proposed contract would be necessary.

Chapter 37-13.3 of the Municipal Code provides as follows:

"Operators of public passenger vehicles having seating capacity for more than five passengers (*other than a regular ground transportation service* as provided in Section 37-13.2 and those bringing groups sponsored by school authorities to the airport for educational purposes) shall be required to secure a single trip permit for the privilege of picking up and loading passengers at the airport for transportation to and from the airport. . . ." (Emphasis supplied.)

Be advised that it is our opinion that provisions of Chapter 37-13.3 of the Municipal Code prohibit the issuance of a single trip permit to operators of a regular ground transportation service.

A single trip permit may not be used as an interim substitute for the provision of Chapter 37-13.2 which requires city council approval of contracts with operators of public transportation systems with respect to the establishment and maintenance of regular ground transportation service.

Therefore, it is our opinion that you may not grant interim authority to the Milwaukee Limousine Service Inc. to operate on a single trip permit basis since they propose to operate a regular ground transportation service.

If the City desires to enter into a contract with the Milwaukee Limousine Service Inc. it will be necessary to consider the contract executed between the Continental Air Transport Company, Inc. and the City of Chicago dated December 30, 1959, especially the provisions of paragraph 4-c which are as follows:

"No carrier, public or private, other than the Company, shall be permitted to solicit on airport property or vehicular driveways, the transportation of passengers to or from the airports and Chicago, Skokie, Evanston and Oak Park. This shall not prevent the city from entering into contracts for the transportation of passengers to and from O'Hare Airport to other cities in Illinois, Iowa and Wisconsin, provided the Company is given the opportunity of first providing such services by written consent thereto within sixty (60) days after notice from the City."

Prior to the contracting with the Milwaukee Limousine Service Inc. it would be necessary for the City to give Continental Air Transport Company, Inc. the opportunity of first providing the service now proposed by Milwaukee Limousine Service Inc.

We are also of the opinion that submission to the Airlines Representative of such proposed contract would not be necessary.

At your request, we have petitioned the Interstate Commerce Commission for reconsideration of the order granting temporary authority to the Milwaukee Limousine Service, Inc. and we are enclosing a copy of the City's Petition.

REGULATIONS GOVERNING PRIVATE WATCH VEHICLE

(J. A. C.—M. E. A. & S. R. D.—May 21, 1965)

Reference is made to your letter of May 3, 1965, in which you request our opinion as to the propriety of vehicles of the William J. Burns International Detective Agency, Inc. using of red mars or flashing type lights.

Under Section 27-349 of the Municipal Code of Chicago:

"No person shall drive or move any vehicle or equipment upon any runway with any ramp or device thereon displaying a red light visible from directly in front thereof".

However, "Authorized Emergency Vehicles" are not included in this prohibition.

Under Section 27-200 of the Municipal Code of Chicago, an "authorized emergency vehicle" is:

"Any vehicle of the Chicago Fire Insurance Patrol, the Fire Department or Police Department of any governmental agency, or any

ambulance, or any repair or service vehicle of a governmental agency. The American Red Cross, or public service corporation, authorized by the Superintendent of Police”.

Since the William J. Burns International Detective Agency Inc. is not a governmental agency or a public service corporation, its vehicles are not exempted from the prohibition against displaying a red flashing light.

Thus, it is our opinion that in order to comply with the Municipal Code of Chicago, the vehicles of the William J. Burns International Detective Agency, Inc. should cease to display the aforementioned red mars light.

OCCASIONAL SERVICE AS EMERGENCY VEHICLE

(Commissioner of Health—B. R.—June 4, 1965)

Your letter of May 20, 1965 addressed to Mr. Raymond F. Simon, Corporation Counsel, has been referred to the writer for reply. You asked for an opinion whether it would be possible to license Servi-Car of Chicago Inc. as an ambulance if Servi-Car would comply with the requirements of Chapter 103 of the Municipal Code of Chicago.

You also requested a copy of the opinion rendered by this office on April 1, 1965 to Mr. Ralph Gross, regarding Servi-Car of Chicago Inc., and we are attaching same.

We have investigated the operations of Servi-Car and find that they operate four (4) Ford Club Wagons for the transportation of physically handicapped, blind and emotionally disturbed persons. Passengers either telephone for transportation or transportation is arranged by social or welfare organizations on a contract basis for the trip. The fare will vary depending on the distance and time involved, number of attendants required and the out-of-car service. The time and out-of-car service would depend on such factors as the weight and the physical infirmity of the passenger to be transported. It was generally determined that the minimum fare would be in the neighborhood of \$5.00 plus a mileage charge.

After investigating the operations of Servi-Car, we are of the opinion that in some instances, Servi-Car Inc. operates as a livery while in other instances, it operates as a school vehicle under the provisions of Chapter 28.2 and in a very few instances, they perform functions similar to an ambulance.

Although “ambulance” is not defined in Chapter 103, we are of the opinion that an ambulance is a vehicle in which the sick or injured persons are transported to a hospital or other locations for medical attention or treatment.

We do not believe it was the intent of the ordinance to license a business which occasionally finds itself performing the function of an ambulance and we are therefore of the opinion that Servi-Car of Chicago Inc. should not be granted an ambulance license.

We have not changed our opinion that Servi-Car of Chicago Inc. is a public passenger vehicle and under the provisions of Chapter 28.2 may not operate unless licensed by the City.

The only Public Passenger Vehicle license category we find that will cover all operations of Servi-Car Inc. is that of a livery license.

If Servi-Car of Chicago Inc. chooses to discontinue accepting individual requests and limits its operation to transporting “. . . children to and from any school, day nursery, day care center, day camp, play ground or any regularly conducted public or private educational, religious, recreational or care program,” then they would be eligible to be licensed as a school vehicle in accordance with the definition of Chapter 28.2-1.

Section C. AMUSEMENT LICENSE AND TAX

McCORMICK PLACE

(City Comptroller—H. H. J. & S. R. D.—March 2, 1961)

We have your letter dated February 17, 1961, in which you request advice as to how to handle the collection of the City's amusement license and amusement license tax that might be due the City because of a public amusement conducted at the Exposition Center in Burnham Park. We assume you are referring to McCormick Place at 23rd Street and the lake front.

Section 104-2 of the Municipal Code of Chicago imposes a license tax "upon all amusements within the city" (with certain exceptions) "of an amount equal to three per cent of the gross receipts from admission fees or other charges."

Section 104-3 of the Municipal Code of Chicago provides for the collection of the license tax and mentions a "term license."

Section 104.1-9 of the Municipal Code of Chicago provides for the issuance of a "term license" and the cost thereof.

Section 104.1-2 of the Municipal Code of Chicago makes it unlawful for the owner or person in control of any property to produce, etc., "or to permit any person to produce, present or conduct thereon, for gain or profit, any amusement, other than those excepted in section 104.1-1, without first having obtained a license for a public place of amusement."

Since McCormick Place cannot be considered as "a public place of amusement" because it is not organized for that purpose and does not conduct on its own behalf public amusements, it is our opinion that it is not required to obtain the license for a public place of amusement required by section 104.1-2.

It is our opinion that anyone conducting a public amusement in McCormick Place is required under section 104-3 to obtain a "term license" and to pay in addition the "license tax" of 3% provided in section 104-2.

It is also our opinion that under section 104.1-2 it would be unlawful for McCormick Place to permit any public amusement on its premises without the operators of such public amusement first having obtained the "term license" required by sections 104-3 and 104.1-9.

MOTION PICTURES IN TAVERNS

(Commanding Officer, Censor Unit—B. E. N.—April 4, 1961)

We have your letter dated March 30, 1961, requesting our opinion as to whether taverns and other public places other than theaters showing motion pictures for the entertainment of patrons, must obtain permits for the exhibition of such pictures.

Chapter 155, Municipal Code of Chicago, provides for the inspection by the Commissioner of Police of all motion pictures before their exhibition in any public place, and further provides for the payment of \$3.00 for each 1,000 lineal feet of film or fraction thereof, in the event that a permit is granted.

The manifest purpose of the requirement of prior inspection and the issuance of a permit is to prevent the exhibition of immoral, obscene or otherwise harmful motion pictures in public places. Section 1 of Chapter 155 of the Municipal Code of Chicago makes it unlawful for any person to show or exhibit any motion picture without a permit, "in a public place, or in a place where the public is admitted." This definition is broad enough to include taverns. While the size of the film generally exhibited by taverns is 16 millimeters, whereas the standard size of films exhibited in motion picture theaters is 35 millimeters, the ordinance makes no distinction with respect to the size of the film projected.

Any person exhibiting any picture or series of pictures without a permit having been obtained therefor under the ordinance can be fined no less than \$50.00, nor more than \$100.00 for each offense. Each day a film is exhibited is a separate and distinct offense.

It is our opinion, therefore, that the inspection and permit requirements of Chapter 155, Municipal Code of Chicago, are applicable to taverns, to the same extent as to motion picture theaters.

CLOSED-CIRCUIT BOXING

(City Comptroller—H. H. P. & S. R. D.—April 26, 1961)

We have your letter dated April 11, 1961, in which you request an opinion as to whether a theater that shows a closed-circuit televised prize fight is entitled to be exempt from the payment of the City's amusement tax on the first ninety cents of the admission price to the theater.

Section 104-2 of the Municipal Code of Chicago, which governs the ninety cent exemption, provides that such exemption shall apply to, "motion picture shows which exhibit motion pictures exclusively." It is clear that the term "motion picture shows" is applicable only to a performance of motion pictures exclusively. Besides, the sole purpose of the exemption is for the benefit of theaters showing motion pictures exclusively.

Since the showing of a closed-circuit television telecast is not the showing of motion pictures, it is our opinion that such a showing does not come within the purview of section 104-2 and the ninety cent exemption is not applicable.

AMUSEMENT DEVICE "PRACTICE RANGE"

(City Collector—W. J. K.—May 15, 1961)

Your inquiry as to whether or not Kiddielane's "Junior Deputy Sheriff Practice Range", an automatic coin operated amusement device (non-electric) comes within the purview of the applicable provisions of Chapter 104 of the Municipal Code of Chicago was given to the undersigned for reply.

Section 104-1, the second paragraph, of the Municipal Code of Chicago defines an "automatic amusement machine" as follows, to-wit:

"The term 'automatic amusement machine' means any mechanical amusement machine or device, the operation of which is governed or controlled by the deposit of a coin or token including, without being limited thereto, any such coin controlled instrument or device capable of producing or reproducing any vocal or instrumental sounds."

According to the definition cited above from the Code the mere fact that it is "non.electrical" does not cause its exclusion and comes within the purview of the Ordinance.

Section 104-1 of the Municipal Code provides that an annual license tax of \$25.00 is imposed upon each automatic amusement machine used within the City for gain or profit.

It is to be noted that before a license shall issue for this device, the manufacturer of same must submit the customary affidavits, original and five copies, detailing the physical structure thereof describing all the features and how the device is played; further said affidavit must also recite the fact that this device offers no free games, awards, prizes or has no match features thereon. With each affidavit there must be attached thereto an actual photograph of the device and a schematic diagram.

P. S. Transmitted and attached hereto is your letter dated May 9, 1961 and letter of Kiddielane Corporation dated May 9, 1961.

AMUSEMENT TAX ON RETAILER

(City Comptroller—H. H. P. & S. R. D.—August 25, 1961)

We have your letter dated August 24, 1961, in which you request an opinion as to whether the Federal Reserve Bank of Chicago is exempt from paying that part of the purchase price of tickets, subject to City's amusement tax, to a play to be given at the Erlanger Theater. A letter attached to your letter from the Federal Reserve Bank of Chicago, claims such exemption under section 7 of the Federal Reserve Act (12 U. S. C. A. 531). You also state in your letter that City's amusement tax is on the receipts of the theater and not against purchasers of tickets thereto, therefore, the Federal Reserve Bank has no exemption when it purchases such tickets.

We agree with your interpretation.

Section 104-2 of the Municipal Code of Chicago, provides:

"A license tax is imposed upon all amusements within the city, . . ., of an amount equal to three percent of the gross receipts from admission fees or other charges, . . ., to witness or to participate in such amusements . . .

"It is unlawful for any person to produce, present or conduct any such amusement for gain or profit, without payment of the tax."

In the case of *Federal Reserve Bank of Chicago v. Department of Revenue of State of Michigan*, 64 N. W. 2d 639, 339 Mich. 587 (1954), the plaintiff, the same Federal Reserve Bank of Chicago now claiming an exemption in this matter, claimed that it, under the same section 7 of the Federal Reserve Act, was exempt from paying a state retailer's tax on purchases made by it. The Supreme Court of Michigan denied such claim and held that the retailer's tax was on the retailer and not the purchaser. That case is analogous to the situation here and is controlling.

TEEN-AGE DANCES ON PREMISES WHERE LIQUOR LICENSE HAS BEEN GRANTED

(Director, Organized Crime Division—W. M.—June 11, 1963)

In response to your communication of April 8, 1963, wherein you request an opinion as to whether or not a retail liquor licensee may cease the sale of alcoholic beverages on the licensed premises on given nights and at given times in order to hold dances for teenagers, serving them soft drinks and food, charging each teenager \$1.00 admission and providing live and mechanical music for said dances, please be advised of the following:

1. Chapter 104-1 of the Municipal Code of the City of Chicago includes dancing within the definition of the word "amusement" and places a license tax (Chapter 104-2) upon all amusement within the City of an amount equal to 3 per cent of the gross receipts from admission fees or other charges to witness or participate in such amusement.

2. Chapter 104.1-1 defines a public place of amusement as any place used or intended to be used for any amusement as defined in Chapter 104 with certain exceptions. Chapter 104.1-2 requires a license for any public place of amusement.

3. Under the provisions of Chapter 104.1-1, a place licensed for the sale at retail of alcoholic liquor where instrumental music by an orchestra of not more than 3 pieces is provided and where no other entertainment is permitted except dancing by patrons under a separate license is an exception to the requirement of a public place of amusement license. There is no exception, however, to the aforesaid requirement if the music is provided mechanically or if the orchestra consists of more than 3 pieces. The licensed premises fall from the excepted class if there is additional entertainment for patrons other than dancing.

4. Although the only restrictions placed upon a licensee relative to the hours of operation are those which limit and provide for prohibited hours wherein the licensee may not dispense alcohol and there are no provisions which require the licensee to dispense alcoholic liquor during the hours which are not so prohibited, the Statute controlling the sale of alcoholic liquor at retail in the State of Illinois does not contemplate licensed premises being used for other purposes than accommodating its patrons according to law.

It is our opinion, therefore, that a retail liquor licensee violates the intent and purpose of the Illinois Liquor Control Act when he ceases the sale of alcoholic liquor during certain hours and uses the licensed premises for teen-age dances irrespective of whether or not he obtains proper licenses and pays the proper taxes as set forth above.

CHESS AND CHECKERS

(City Collector—W. J. K.—August 29, 1963)

We acknowledge receipt of your letter of August 1, 1963, in which you enclose copy of a letter under date of July 23, 1963, from the Northwest Community Organization, 1109 N. Ashland Avenue, addressed to Mr. John Billings, Mayor's Office of Inquiry, and referred to your office for attention and reply.

You advise that the letter relates that inquiry is being made on behalf of a person who owns a building in which a first floor store is vacant. The

writer further states that the owner wishes to provide facilities, tables, chairs and equipment, for chess and checker players. He also proposes to sell food for consumption on the premises and to charge the participants of the chess and checker games a fee per game.

You quote Section 104-1 of the Municipal Code, in part which provides :

"The word 'amusement' means . . . ; (2) Any entertainment offered for public participation, including without being limited to, dancing, carnival, amusement park rides and games, bowling, billiard and pool games."

You also quote Section 104.1-2 of the Municipal Code, which provides as follows:

"It is unlawful for the owner or person in control of any property to produce, present or conduct thereon or to permit any person to produce, present or conduct thereon, for gain or profit, any amusement, other than those excepted in Section 104.1-1, without first having obtained a license for a public place of amusement."

You call our attention to Section 104.1-7 which provides, in part, as follows:

"All public places of amusement are divided into the following classes:

- Class 1
- Class 2
- Class 3

Class 2. Amusement park, hall, billiard and pool room, bowling alley, or other public resort, exclusive of such parts thereof as fall within Class I places of amusement, designed, used or intended to be used only for participation in the amusement or entertainment by the public assembly."

You also quote Section 104-2 of the Code which, in part, provides as follows:

"A license tax is imposed upon all amusements within the city, excepting automatic amusement machines, of an amount equal to three percent of the gross receipts from admission fees or other charges, exclusive of federal and state taxes, to witness or participate in such amusements; . . ."

You request our opinion as to whether a City of Chicago Public Place of Amusement Class 2 license is required in connection with the business activity, and you further propound the question as to whether the license tax provided for by Section 104-2 is applicable to such admission fees or other charges as may be imposed in the operation and course of the described activity whether City of Chicago Public Place of Amusement Class 2 license is required or not.

The ordinances recited herein were passed by virtue of authority given by Section 11-42-5 of Chapter 24 of the Cities and Villages Act wherein it is provided, to-wit:

"The corporate authorities of each municipality may license, tax, regulate, or prohibit . . . theatricals and other exhibitions, shows, and amusements and may license, tax, and regulate all places for eating or amusement."

The game of chess and checkers in our opinion is an amusement under the terms of the statute and the ordinance, broad enough to include participation entertainment. Webster says that the word "amusement" is synonymous

with diversion, entertainment, recreation, pastime and sport (*Chicago v. Green Mill Gardens*, 305 Ill. 87, at page 93).

It is, therefore, our opinion that the business activity that you describe in your letter comes within the purview of the ordinance and should be classified as a Public Place of Amusement Class 2 and is also subject to amusement tax of 3% as provided for in Section 104-2 of the Municipal Code. Further, the sale of foods upon the premises would also require a Food Purveyor's License.

"ENCORE THEATRE"

(Comptroller of the City of Chicago—W. J. K.—October 15, 1963)

We have your request for an opinion relating to a corporation not-for-profit, that is exempt from license tax (Amusement Tax) as provided for by Section 104-2 (Par. 3) which owns or leases a building, the operation of which produces revenue used to liquidate its mortgage and/or increasing its fixed assets and further that the net earnings, if any, do not inure to the benefit of the shareholder or person; whether or not the organization because of the exemption of the license tax exempts it from having a Public Place of Amusement License Class I as required under Section 104.1-2 of the Municipal Code.

I have also received an unsolicited opinion from an Attorney (copy of which is attached), who represents "Encore Theatre", which is a defendant in a pending case in the Municipal Court charged with operating a Public Place of Amusement without first obtaining a license so to do as provided for by Chapter 104.1 of the Code. He concludes that a license is not necessary for the reason that certain non-profit organizations such as "The University of Chicago, Chicago Tribune Charities, Temple Shalom, Chicago Music College Benefit, Chicago Businessmen's Orchestra, and Lyric Theatre were required to pay a tax (Amusement Tax) although the license (Public Place of Amusement) was never directly ruled on."

The Attorney's opinion and your letter referred to the same subject matter, that is, the Encore Theatre.

Pursuant to Section 11-42-5 of Chapter 24 of the Cities and Villages Act of the Illinois Revised Statutes of 1961, quoted *haec verba* to-wit:

"11-42-5. Hawkers and peddlers—Shows—Places for eating or amusement.) § 11-42-5. The corporate authorities of each municipality may license, tax, regulate, or prohibit . . . theatricals and other exhibitions, shows, and amusements and may license, tax, and regulate all places for eating or amusement."

the City Council of the City of Chicago enacted Chapter 104.1 entitled "Public Places of Amusement" and Chapter 101 entitled "General Licensing Provisions", specifically Sections 104.1-1, 104.1-2, 104.1-3 and 104.1-4; and Sections 101-1, 101-4 and 101-5 cited herein *haec verba* to-wit:

"104.1-1. As used in this ordinance a public place of amusement means any building or part of a building, park or other grounds used or intended to be used for any amusement as defined in chapter 104 of this code, excepting (1) an automatic amusement machine and (2) instrumental music by an orchestra of not more than three pieces in a hotel or restaurant where no dancing or other entertainment is permitted or in a place licensed for the sale at retail of alcoholic liquors where no other entertainment is permitted except dancing by patrons of such place under separate license (Passed. Coun. J. 11-6-47, p. 1169; amend. 12-12-47, p. 1340).

104.1-2. It is unlawful for the owner or person in control of any property to produce, present or conduct thereon or to permit any person

to produce, present or conduct thereon, for gain or profit, any amusement, other than those excepted in section 104.1-1, without first having obtained a license for a public place of amusement (Passed. Coun. J. 11-6-47, p. 1169; amend. 12-12-47, p. 1340; 9-26-56, p. 3272; 3-14-57, p. 4440).

104.1-3. An application for said license shall be made in conformity with the general requirements of this code relating to applications for licenses. Said application shall be signed by the owner or lessee of the property in his own proper person or in his name by his duly authorized agent.

The application shall set forth a description of the property used or intended for use as a public place of amusement, indicating the seating capacity and the floor area or ground area of the place, and such other information as the city collector may require in the form prescribed by him from time to time (Passed. Coun. J. 11-6-47, p. 1169; amend. 12-12-47, p. 1340).

104.1-4. Each application and all information required to be furnished in connection therewith or a copy shall be referred to the commissioner of buildings, the commissioner of streets and electricity, the division marshal in charge of the bureau of fire prevention, and the commissioner of police. Each officer shall certify to the mayor whether or not the applicant is qualified to receive the license applied for and whether or not the place complies in every respect with the applicable provisions of this code relating to his department. No license shall be issued without approval by the mayor (Passed. Coun. J. 11-6-47, p. 1169).

101-1. It shall be unlawful for any person to conduct, engage in, maintain, operate, carry on, or manage a business or occupation for which a license is required by any provision of this code without a license first having been procured for such business or occupation. Any person violating this section shall be fined not less than ten dollars nor more than two hundred dollars for each offense, and every day such violation continues shall constitute a separate and distinct offense.

101-4. All applications for licenses of any character whatsoever, except those licenses specifically excepted, shall be made in writing to the city collector on a form provided for that purpose.

Every application for a license shall contain the name of the person desiring the same and the place of business of such applicant. If the applicant is a partnership or firm, the application shall contain the names and residence addresses of each of its members; if a limited partnership, the names and residence addresses of each general partner thereof; and if a corporation, the application shall contain the names and residence of its principal officers. In addition to such statements, there shall be set forth in said application the location of the place of business, or proposed location thereof, for which the license is sought, and such other information as may be required by the city collector in conformity with the provisions of this code prescribing the requirements of such license . . ."

101-5. Upon receipt of an application for a license which requires an investigation or an inspection by any department or board of the city, and the approval thereof as to the character or fitness of any applicant for a license, or as to the proper location or condition of the premises in which the business, for which a license is applied, is to be managed, conducted, operated, or carried on, the city collector shall transmit to each department or board charged with the investigation and approval of any such application such information as may be necessary in order that the required investigation or inspection may be made. Each department head or president of a board charged with such investigation or inspection shall, immediately upon receipt of such information from the city collector, cause an investigation or inspection to be made, and shall, within ten days after the receipt of said information from the city collector, either approve or disapprove the issuance of such license, and shall notify the city collector accordingly.

Upon receiving satisfactory proof from the city collector that the applicant or each of the principal officers, if the applicant is a corporation, is a fit and proper person to be granted such license, and that all laws and provisions of this code regulating the business or occupation for which such license is applied for, have been complied with, the mayor may authorize the issuance of the said license by the city clerk.

If any department head or president of a board shall disapprove such application and the applicant for license shall be in business or shall have engaged in the occupation for which a license is sought, it shall be the duty of such department head or president of a board to take such action as shall be necessary to compel compliance with the provisions of this code."

It is to be noted that from the above-quoted sections that an applicant for a Public Place of Amusement Class I License must show approval of its application, in that it has complied with the Building Department, Department of Electricity, Department of Streets and Sanitation, Fire Prevention Bureau, Ventilation Department and the Police Department. After a full compliance has been had with the ordinances, the application for said license is then marked "Approved" by the City Collector and a license will issue. This is all done in the interest of the public welfare and safety.

Referring to Counsel's letter as to certain non-profit organizations, it is to be noted that the Chicago Tribune Charities, the Lyric Theatre, Chicago Businessmen's Orchestra, etc., operate and conduct their particular amusements on premises for which a Public Place of Amusement Class I License has been issued.

Answering your inquiry as to the exemption from the license tax *per se*, "Does that exempt organizations from the necessity of having a license as required under Section 104.1-2?"—the answer is "No."

AMUSEMENT LICENSE REQUIRED

(City Collector—W. J. K.—January 13, 1964)

In your letter of recent date you requested an opinion as to whether a Public Place of Amusement license is required in the following situations and, if so, under which of the three classes of Public Places of Amusement would the premises be licensed:

1. An establishment licensed as a food dispenser, where no liquor is dispensed on the premises, which provides one or more persons who sing for the entertainment of the patrons of the said establishment and play their own musical accompaniment, and where no dancing by the patrons is permitted (Please note that the entertainment is not confined to instrumental music).
2. An establishment licensed as a City food dispenser, where no alcoholic liquor is dispensed on the premises, which provides one or more performers who may play musical instruments, sing or *otherwise perform* for the entertainment of the patrons of the establishment, but where no dancing by the patrons is permitted (Please note that the entertainment is not confined to instrumental music).
3. An establishment licensed as a City food dispenser, where no alcoholic liquor is dispensed on the premises, which provides either "live musicians" or "juke box" music and permits dancing by the patrons of the said food dispensing establishment.

4. An establishment licensed as a City food dispenser, where no alcoholic liquor is dispensed on the premises, but which provides comedians or other acts of entertainment for the patrons of the establishment, but where no dancing is permitted by the patrons of the establishment.

The City Council of the City of Chicago, by virtue of Section 11-42-5 of the Cities and Villages Act of Chapter 24 of the Illinois Revised Statutes of 1963, quoted haec verba, to-wit:

"The corporate authorities of each municipality may license, tax, regulate, or prohibit * * * theatricals and other exhibitions, shows, and amusements and may license, tax, and regulate all places for eating and amusement."

enacted Chapter 104.1 entitled "Public Places of Amusement" and Chapter 104 entitled "Amusements."

"Public Places of Amusement" are defined as follows:

"As used in this ordinance a public place of amusement means any building or part of a building, park or other grounds used or intended to be used for any amusement as defined in chapter 104 of this code, excepting (1) an automatic amusement machine and (2) instrumental music by an orchestra of not more than three pieces in a hotel or restaurant where no dancing or other entertainment is permitted or in a place licensed for the sale at retail of alcoholic liquors where no other entertainment is permitted except dancing by patrons of such place under separate license."

The aforesaid section embodies in itself a reference to Chapter 104 which defines the word "amusements" as follows, to-wit:

"104.1. Definitions.)

The word 'amusement' means any theatrical, dramatic, musical or spectacular performance, motion picture show, circus, rodeo, animal act, athletic contest, sport, or similar exhibition, and includes, without being limited thereto, poultry, animal and flower shows, boxing, wrestling, skating, dancing, swimming, racing or riding on animals or vehicles, baseball, basket ball, soft ball, football, tennis, golf, hockey, track and field games, bowling, billiard and pool games and the operation of automatic amusement machines and other mechanical devices and apparatus."

Under Section 104.1-7, Public Places of Amusement for licensing are classified into three classifications, to-wit:

Class 1. Auditorium, theater, tent or stadium provided with a screen, stage, arena or other space for a theatrical dramatic, musical or spectacular performance, motion picture show, circus, rodeo, animal act, athletic contest, sport or similar exhibition, designed, used, or intended to be used for the amusement or entertainment of an audience or spectators and not for participation by the public assembly. This class shall not, however, include a cabaret.

Class 2. Amusement park, hall, billard and pool room, bowling alley, skating rink, swimming pool, or other public resort, exclusive of such parts thereof as fall within Class 1 places of amusement, designed, used or intended to be used only for participation in the amusement or entertainment by the public.

Class 3. Cabaret."

Section 104.1-8 relates to the fees charged for each Class according to seating capacity, together with any additional floor and field area.

Your request for an opinion in each of the four instances pertain to establishments licensed as "food dispensers" under Section 130-15 of the Code and also states that there are no alcoholic beverages served, but add to their business certain types of "entertainment" or "amusements" in which the patrons or customers do or do not participate, so that the premises are intended to be used as a food establishment for which a proper license had been obtained; the licensee adds an amusement for the entertainment of its patrons or adds an amusement in which its patrons participate and no admission is charged in either instance, but said amusement or entertainment is added for the purpose of increasing the patronage of the establishments which in turn results in the increase of its business. It becomes apparent that the licensee is adding an amusement or entertainment. These additional ventures are not covered by a Food Dispenser's License and in our opinion should be appropriately licensed and meet the additional regulations of the City Code covering Public Places of Amusement as provided for under Chapter 104.1 of the Code.

We do not believe it was the intention of the City Council when legislating upon the subject to authorize amusements, entertainments and shows in establishments where food is dispensed to the public without regard to regulation and licensing under the Public Places of Amusement ordinances.

It is, therefore, concluded that an establishment licensed as a food dispenser under your categories of 1, 2, and 4 should be licensed as a Public Place of Amusement Class 1, and category Number 3 should be licensed as a Public Place of Amusement Class 2, provided the applicant and premises comply with all the requirements of the Code.

EXEMPTION FOR BENEFIT BY CHARITABLE ORGANIZATION

(Acting City Comptroller—E. W. P.—October 9, 1964)

We acknowledge receipt of your letter dated October 1, 1964. You advise that each year the Augustana Hospital Auxiliary sponsors the opening night benefit performance of the Shipstads and Johnson Ice Follies in late October at the Chicago Stadium. You further advise that the net proceeds go to the Free Care Fund of Augustana Hospital to be used for the care of needy patients. The Augustana Hospital Auxiliary pays the Chicago Stadium a flat \$18,000 which covers payment to the Ice Follies, rental, light, usher services, etc. at the Chicago Stadium. You state that under the Amusement Tax Ordinance there is no question that the proceeds from the tickets sold by the Augustana Hospital Auxiliary, whether sold outside or at the Chicago Stadium, are exempt from the 3% tax.

Section 104-2 of the Municipal Code reads as follows:

"A license tax is imposed upon all amusements within the city, excepting automatic amusement machines, of an amount equal to three percent of the gross receipts from admission fees or other charges, exclusive of federal and state taxes, to witness or to participate in such amusements; provided, however, that said tax shall not apply to or be imposed upon the privilege of witnessing or participating in any stock show or business show, or any amusement the proceeds of which, after payment of reasonable expenses, inure exclusively to the benefit of:

(1) religious, educational and charitable institutions, societies or organizations; . . .

Provided, however, that no part of the net earnings under paragraphs (1) to (5) inure to the benefit of any shareholder or person. . . ."

In the last sentence of the third paragraph of your letter you request our opinion as to whether the \$18,000 (presumably required to cover cost of the production) is exempt from the federal tax. In our opinion we should first consider whether this \$18,000 paid by the sponsor to the Chicago Stadium is entirely exempt from the 3% Amusement Tax of the City, i.e., whether this charge, exclusive of Federal and State taxes, if any, inures to the benefit of any shareholder or person. Should you determine that this entire amount be consumed to cover the cost of the production and none of it inure to the benefit of a person or shareholder, it is our opinion that the exemption would apply. If you should determine that any part of it constitutes remuneration to any person or shareholder, that part would be subject to the tax.

With reference to the exemption, if any, from the Federal tax we are advised by the Internal Revenue Service that the sponsor should file with the Internal Revenue Form 755, which is their Admission Exemption Form. The Augustana Hospital Auxiliary is undoubtedly familiar with this procedure covering their benefit performances of previous years.

For your further perusal on the subject of the Amusement Tax of the City, we refer you to an opinion along the same lines as the subject matter addressed to the Acting Comptroller written by the late Mr. Gorman, of this office, on September 15, 1960 reported in Volume 24 at page 380 of the Opinions of the Corporation Counsel.

"BAGATELLE" AND "PIGEONHOLE"

(L. M.—W. J. K.—January 19, 1965)

Your "request for advice pertinent to a most recent ordinance where games that use a ball that falls in a pocket * * * May I have a copy of the regulatory report" has been turned over to the undersigned for reply.

Please be advised that the City Council of the City of Chicago has not passed on any ordinance or amended its ordinance of recent date pertaining to pin games.

Section 193-26 of the Municipal Code of Chicago has been in existence for approximately 40 years and is rigidly enforced by the City authorities, so that no pin games are allowed to be used, operated or licensed in the City of Chicago.

Section 193-26 is quoted herein, to wit:

"It shall be unlawful for any person to keep or use in any place of public resort within the city any tables or implements for any game of bagatelle or pigeonhole.

"The term 'bagatelle or pigeonhole,' as used in this section, shall mean a game played with any number of balls or spheres upon a table or board having holes, pockets or cups into which such balls or spheres may drop or become lodged and having arches, pins, and springs, or any of them, to control, deflect, or impede the direction or speed of the balls or spheres put in motion by the player, and shall include the modern variety of bagatelle or pigeonhole commonly known as pin games.

"The term 'place of public resort,' as used in this section, shall mean any premises wherein any service or merchandise is offered for sale to the public or where tables or implements for playing the game of bagatelle or pigeonhole are kept for gain or profit, or any premises used as a clubhouse or clubrooms.

"It is hereby made the duty of every policeman to seize any table or implement kept or used in violation of this section and, upon conviction of the keeper thereof, such table or implement so seized shall be destroyed. Any person obstructing or resisting any policeman in the performance of any act authorized by this section shall be fined not less than twenty-five dollars nor more than two hundred dollars for each offense."

MINIATURE AUTO RACES IN "HOBBY SHOP"

(City Collector—W. J. K.—March 15, 1965)

In your letter requesting an opinion as to whether "hobby shops" wherein the owners or operators permit their premises to be used for the purpose of "racing miniature automobiles" on a table called a race track with set up "slotted" tracks are subject to being licensed as a public place of amusement.

You state that "enthusiasts of miniature automobile racing bring their automobiles to the hobby shops or obtain miniature cars on the premises from the owner for the purpose of racing the miniature cars of their choice against the miniature cars of other enthusiasts. Each participant pays the owner or hobby shop operator a fee for the use of the track or the privilege of participating in the races. The miniature cars are under control of the individual participant while being raced." * * * "Persons congregate on the premises for * * * not ascertained whether admission or other charge is made to witness these races." Section 104-1 of the Municipal Code defines the word "amusement" as follows:

"(1) * * *

- (2) Any entertainment offered for public participation, including, without being limited to, dancing, carnival, amusement park rides and games, bowling, billiards and pool games."

So that this amusement or sporting activity in which the public participates, and upon premises set up for this purpose, comes within the purview of said Section 104-1 and should be classified as a public place of amusement Class II, provided by Section 104.1-7, to-wit:

"All public places of amusement are divided into the following classes:

Class * * *

Class 2, amusement park, hall, billiard and pool room, bowling alley, or other public resort, exclusive of such parts thereof as fall within Class 1 places of amusement, designed, used or intended to be used only for participation in the amusement or entertainment by the public assembly."

Further compliance must be had with Chapter 104.1 entitled "Public Places of Amusement" which provides that an applicant for a Public Place of Amusement License must comply with the ordinances pertaining to zoning, building, electrical, ventilating and fire prevention."

This activity also becomes subject to Section 104-2 of the Municipal Code which imposes upon all amusements conducted within the City, a license tax of 3% of the gross receipts from admission fees and other charges to witness or participate in such amusements.

FULL VIEW REQUIRED OF A BILLIARD ROOM

(Director, Vice Control Division, Department of Police—W. J. K.—
April 19, 1965)

A request for an opinion was received from Lieut. John Corless of the License Section, Vice Control Division, regarding an application for a Public Place of Amusement Class 2 (Pool and Billiard) License for premises located at 54 W. Randolph Street, Basement level, and to the application of Paragraph 3 of Section 104.1-14 of the Municipal Code of Chicago, which states as follows:

"... No person conducting or operating a billiard or poolroom shall allow or permit any screens, curtains, blinds, partitions or other obstructions to be placed between the front windows and back or rear wall of such room, but an unobstructed view of the entire interior must be maintained at all times. This provision, however, shall not be construed to preclude the maintenance of wash-rooms or toilet rooms, or the maintenance of closets for storing purposes exclusively (Passed. Coun. J. 12-12-47, p. 1340. Amend. 11-15-63; p. 1200)."

In Volume 11, page 514, of Opinions of the Corporation Counsel, a similar request was made for an interpretation of the existing Pool Room ordinance (1922), Section 13 of the Municipal Code, as to the Pool and Billiard Rooms located on the second or third floors or in basements, said ordinance read as follows:

"Section 13. Screens and Partitions Prohibited. No billiard room operating under the provisions of this ordinance shall allow or permit any screens, curtains, blinds, partitions or other obstructions to be placed between the front windows and back or rear wall of such billiard room. A clear view of the entire interior from the front street to the rear of such room must be maintained at all times. No partitions forming rooms, stalls, or other enclosures where the public congregate, shall be permitted. This provision, however, shall not be construed to preclude the maintenance of wash rooms and toilet rooms for proper purposes, or the maintenance of closets for storing purposes exclusively."

It is to be noted that the ordinance at that time specifically stated: "A clear view of the entire interior from the front street to the rear of such room must be maintained at all times."

The author of the opinion stated also "that the ordinance is very obscurely worded, and that it needs to be amended in several respects in order to clearly express the meaning of the City Council."

It is very apparent that the City Council amended the ordinance to its present status and construed it to mean an unobstructed view "from inside the front door," not stating at what level the subject premises sought to be licensed is located.

Therefore, it is our opinion that if the full interior of the Pool or Billiard room is visible, without obstruction, from the entrance door, this would constitute compliance with the ordinance.

"SCOPITONE"

(City Collector—W. J. K.—May 5, 1965)

Your letter of recent date wherein you state that your office has received several applications for licenses for automatic amusement machines from "Scopitone Operations" has been referred to us for reply.

The machines are coin-operated and in appearance simulate a "juke box" with a "26-inch movie screen mounted on top". It is equipped with "36 fascinating short features * * * on 16 mm film, projected in full color. * * * Average running is three minutes." The film has a "magnetic sound track which is run through a projector" and "is rewound * * * during the projection of the next one". "Scopitone adds motion pictures to the sound" and * * * "Scopitone's present library (of films) was made in France and consists mainly of songs sung in French." This type of film is in the category of "Hollywood" or risque films.

A representative of the City Collector's office and the undersigned had the opportunity to have this device demonstrated, and its operations were viewed at the "Gay 90's", a lounge in the LaSalle Hotel, and at the "Dome", a tavern in the Sherman Hotel, at which time patrons of these places were able to observe the picture in color and sound.

Section 104-1 of the Municipal Code of Chicago, in part, provides :

"The term 'automatic amusement machine' means any mechanical amusement machine or device, the operation of which is governed or controlled by the deposit of a coin or token including, without being limited thereto, any such coin controlled instrument or device capable of producing or reproducing any vocal or instrumental sounds."

Section 104-4 of the Municipal Code of Chicago provides as follows :

"An annual license fee of twenty-five dollars (\$25.00) is imposed upon each automatic amusement machine used within the City for gain or profit from operation."

There are several questions propounded in your request for an opinion :

Question 1, as to whether this device is an automatic amusement machine within the purview of Section 104-1 of the Municipal Code must be answered in the affirmative and comes within the definition contained therein.

Question 2, as to whether the owner or operator of the "Scopitone" is subject to the annual license tax as provided for in Section 104-4 must also be answered in the affirmative.

Question 3, as to whether the owner or operator of "Scopitone" which offers a short movie subject in conjunction with the music is required "to obtain some type of certificate or permit from City authorities to exhibit the said motion pictures *before an application may be accepted by this office for an Automatic Amusement Machine License for such said device?*"

Section 155 of the Municipal Code of Chicago entitled "Motion Pictures" provides as follows :

"155-1. It shall be unlawful for any person to show or exhibit in a public place, or in a place where the public is admitted, anywhere in the city any picture or series of pictures of the classes or kinds commonly shown in mutoscopes, kinetoscopes, or cinematographs, and such

pictures or series of pictures as are commonly shown or exhibited in so-called penny arcades, and in all other automatic or motion-picture devices, whether an admission fee is charged or not, without first having secured a permit therefor from the superintendent of police.

"It shall be unlawful for any person to lease or transfer, or otherwise put into circulation, any motion-picture plates, films, rolls, or other like articles or apparatus, from which a series of pictures for public exhibition can be produced, to any exhibitor of motion pictures, for the purpose of exhibition within the city, without first having secured a permit therefor from the superintendent of police.

"The permit herein required shall be obtained for each and every picture or series of pictures exhibited and is in addition to any license or other imposition required by law or other provision of this code.

* * *

"155-2. Before any such permit is granted, an application in writing shall be made therefor to the superintendent of police, and the plates, films, rolls, or other like apparatus by or from which such picture or series of pictures are shown or produced, or the picture or series of pictures itself as shown or exhibited, shall be shown to the superintendent of police, who shall inspect such plates, films, rolls, or apparatus, or such picture or series of pictures, or cause them to be inspected by the Film Review Section herein provided for, and within three days after such inspection he shall either grant or deny the permit. In case a permit is granted it shall be in writing and in such form as the superintendent of police may prescribe.

"A Film Review Section of not less than six members shall be appointed under the supervision of the superintendent of police whose duty it shall be to review in the entirety all motion pictures sought to be exhibited in the City of Chicago. At least three members of the Section shall review each motion picture submitted and shall recommend in writing to the superintendent of police whether to grant or deny a permit.

"155-3. The fee for the original permit in each case shall be three dollars for each one thousand lineal feet of film or fraction thereof, and for each duplicate or print thereof an additional fee of one dollar for each one thousand lineal feet of film or fraction thereof, which fee shall be paid to the city collector before any permit is issued.

"155-4. Such permit shall be granted only after the motion-picture film for which said permit is requested has been produced at the office of the superintendent of police for examination.

"If a picture or series of pictures, for the showing or exhibition of which an application for a permit is made, is obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being, it shall be the duty of the superintendent of police to refuse such permit; otherwise it shall be his duty to grant such permit."

The owner or operator of "Scopitone" must comply with Chapter 155 of the Code, specifically those recited *haec verba* above and permits for the "films" and "copies" must first be had and obtained prior to the issuance of an automatic amusement machine license, as provided for by Section 155-1 third paragraph thereof.

VESTED RIGHT IN AMUSEMENT LICENSE

(*City Collector—E. W. P.—July 7, 1965*)

We acknowledge receipt of your letter dated June 30, 1965 in which you enclosed copy of letter addressed to you under date of June 29, 1965, from Mr. Homer Godfrey, 5540 N. Artesian Avenue, Chicago, Illinois. Mr. Godfrey advises that he is the operator and owner of the premises at 4324 W. Lawrence Avenue, which offers facilities for young people to race miniature automobiles. He began the aforesaid business and invested therein prior to the time when it was determined that a Public Place of Amusement Class II license was applicable thereto. On May 4, 1965, he applied for a Public Place of Amusement Class II (Slot Racing) license for the premises which was disapproved because the premises are located within 200 feet of a church. The business, he advises, is operated in a wholesome manner with approval by the church in the way the activities are conducted.

Mr. Godfrey contends that having established the business prior to the time when the said license was held to be applicable he has acquired vested rights. Your records, obtained through the Police Department, note that the applicant commenced his business on December 1, 1964. You quote the pertinent provisions of the Municipal Code and request our opinion as to whether a license in this case may issue without reference to Section 104.1-5, which cites the location requirement as it pertains to proximity to a church, hospital or building used exclusively for educational purposes. This section provides the exception as follows:

“ . . . unless the place to be licensed has been established as a public place of amusement before the establishment of the church, hospital, or educational institution . . . ”

Here, however, you have a situation where the owner established his use for race miniature automobiles prior to the determination that a Public Place of Amusement Class II license was applicable. This situation in our opinion, although it is not within the exception set forth in the ordinance, comes within the rule of vested rights insofar as the application of the location ordinance is concerned (*Lee v. City of Chicago*, 390 Ill. 306).

It is our opinion that the owner requires the license for Public Place of Amusement Class II (Slot Racing), but that the license may issue regardless of the location ordinance provided the applicant meets all other applicable regulations.

CODE REQUIREMENTS FOR BILLIARD PARLORS

(*Administrative Assistant to the Mayor—R. L. C.—January 12, 1966*)

I am in receipt of your recent request for a clarification of apparently conflicting Municipal Code requirements concerning the application and the issuance of licenses for billiard parlors and poolrooms. Sections 21-13 through 21-18 (passed December 28, 1920, Council Journal pages 1510-13) create the “Billiard Commission” and imposes upon it the duty “to pass upon the qualifications of applicants for licenses”. Section 21-18 charges the Commission with the responsibility to “keep a registry of the name and the location of the place of business of each person, firm, club, corporation or association licensed under Chapter 110.” As Chapter 110 (Billiard Rooms) was repealed by Council ac-

tion December 12, 1947, the Billiard Commission is stripped of any meaningful role in control of billiard parlors or poolrooms.

In November of 1947, the City Council passed a comprehensive licensing ordinance for all "public places of amusement" (Chapter 104.1 Municipal Code, 1169 Council Journal 11/6/47). Section 104.1-7 specifically lists billiard and poolrooms as a Class 2 type of public place of amusement. Section 104.1-3 states, "an application for said license (public place of amusement) shall be made in conformity with the general requirements of this Code relating to applications for licenses."

The 1947 comprehensive ordinance for public places of amusement provides that the Commissioner of Buildings, the Commissioner of Streets and Electricity, the Chief of the Fire Prevention Bureau and the Superintendent of Police "certify whether or not the *applicant is qualified* to receive the license applied for *and* whether or not the place complies in every respect with the applicable provisions of this Code." It is obvious that the 1947 amendment has specifically embraced the safeguards sought to be provided by the Billiard Commission (i.e., applicant's qualifications) and has, in fact, gone further in requiring additional reviews of the application as it pertains to the location.

The Billiard Commission is obviously without power to vary the terms of the zoning code as to the appropriateness of the location; and is obviously without competence in determining the safety factors present in a proposed location. The new comprehensive licensing provisions provide for a review of the application with these criteria in mind, and in addition, perpetuate for the Superintendent of Police his role in determining the qualifications of the individual applicant.

Logic, as well as legislative and statutory construction, dictate the conclusion that the passage of Chapter 104.1 and the repeal of Chapter 110 of the Municipal Code has rendered the Billiard Commission obsolete. A billiard parlor or poolroom license application should be processed in accordance with the provisions of Chapter 104.1 without regard to the duplication which would be implicit in impaneling the Billiard Commission.

METHODS USED BY ORGANIZATIONS EXEMPT

(Acting City Comptroller—R. L. H.—August 25, 1965)

Your recent letter requests our office to resolve an apparent conflict in two prior opinions regarding amusement taxes and organizations exempt therefrom under Section 104-2 of the Municipal Code. The two opinions referred to are the ones written by the late Mr. Gorman of our office on September 15, 1960, and by Mr. Parlee of our office on October 9, 1964.

We have reviewed both of these prior opinions and find no real conflict. Both opinions relate to specific factual situations which differ completely one from the other.

There are basically two completely separate and distinct methods whereby organizations exempt from the amusement tax raise funds through the utilization of public performances of amusements.

Under one method, the organization purchases tickets for a performance of an amusement from the producers thereof. This can be a purchase at the regular box office price, less or including taxes, or at a lower price. In any event, a sale of tickets has been made by the producers of the amusement and said sale is subject to the amusement tax in the same manner as sales to the general public in the usual box office manner would be taxable. Whether the producer chooses to pass the tax on to the organization or not is irrelevant,

since it is the tax on the sale which the producer is responsible for paying. This is the situation covered by the opinion of September 15, 1960.

Under the second method, the situation raised in the request for the opinion dated October 9, 1964, the exempt organization enters into an agreement with the producers of an amusement whereby the organization becomes the producer of the amusement for a particular performance for a certain flat fee. This fee covers rent for the hall, the costs of utilities, ushers' services, performers' services, and all other reasonable and necessary expenses connected with the performance. The organization then sells tickets at whatever price they choose, and are solely responsible for any profits or losses therefrom. So long as the net proceeds inure solely to the benefit of the exempt organization, no amusement tax applies.

Your letter also raises a question about an exempt organization contracting with a sponsor to produce an amusement and whether the payment to the sponsor would be exempt. It is our opinion that this factual situation falls within the second method of fund raising enumerated above. The exempt organization, rather than becoming the producer of a going amusement for a performance thereof under the basic situation, now contracts to become the producer of an amusement performance of its own. The fee paid to the sponsor will cover all of the expenses enumerated above. So long as the net proceeds of the performance inure to the sole benefit of the organization, no amusement tax is applicable.

The Code provision granting the exemption from this tax applies only where the exempt organization is itself the producer of the amusement. This was stated in the Opinion of September 15, 1960. Where an agreement giving rise to fund raising by an exempt organization is in the nature of an agreement where the organization acts as producer for the amusement, no amusement tax applies to the sale of tickets as long as all *net proceeds*, over and above reasonable expenses, inures to the benefit of the organization, and no part thereof inures to the benefit of any individual or stockholder.

The Internal Revenue Service has taken the same approach to the Federal Amusement Tax over the years. The IRS has taken the position and it has been upheld in the courts that if an organization has received an exemption from Federal Income Taxes, and said organization produces an amusement, the net proceeds of which inure to the benefit of said organization and not to any individual or stockholder, there will also be an exemption of Federal Amusement Tax. See, *District Director of Internal Revenue v. Long Beach Chamber of Commerce*, 327 F. 2d 857 (1964). This Federal Amusement Tax has been removed as of January 1, 1966.

A situation which although different factually may be used for comparison purposes relates to the City License Fee as a condition precedent to the putting on of an amusement. Ordinarily when the students of a drama school put on a performance for parents and friends, the non-profit drama school would receive an exemption for the license fee. Where, however, part of the profits from the performance inured directly to the personal benefit of the director and major stockholder of the drama school rather than having all of said profits inuring to the school itself, the imposition of the license fee was upheld. *Jack & Jill Players v. City of Chicago*, 332 App. 444 (1947).

If we can be of any further service to you in this matter, please feel free to call upon us at your convenience.

NOT FOR PROFIT VENTURE

(Vice Control Director—C. J. O.—November 23, 1966)

Your recent letter concerning the above described establishment has been referred to the undersigned for reply.

In the letter of Lieutenant John J. Corless attached to your request letter, he states that a Coffee Shop is being operated near the University of Chicago; that the business is operated as a not for profit venture; and that it is largely supported by the donations of faculty members. Further pertinent facts set forth are that dramatic readings, recitals of free verse, guitar playing and other forms of entertainment are provided by the patrons without compensation.

The basic legal question you raise is whether or not the owners of the establishment must obtain an amusement license pursuant to Chapter 104.1 of the Municipal Code of the City of Chicago. In our opinion, the owners of this particular establishment are not required to have a license and are implicitly exempted in the language of Paragraph 104.1-2, which provides as follows:

"It is unlawful for the owner or person in control of any property to produce, present or conduct thereon or to permit any person to produce, present or conduct thereon, for gain or profit, any amusement, other than those excepted in Section 104.1-1, without first having obtained a license for a public place of amusement."

Since the amusement is supplied by patrons themselves, without gain or profit and since there is no charge for the amusement, there would be no basis for the application of this provision.

LICENSING WHOLESALE DRUG, CHEMICAL AND PAINT STORES

(City Collector—E. W. P.—February 16, 1961)

We have your letter dated December 2, 1960, in which you transmit a letter received by you from McKesson and Robbins, Inc., 155 East 44th Street, New York 17, New York, dated November 30, 1960, which reads as follows:

"Our local divisions at 540 West Randolph Street and 3100 South California Avenue, Chicago, Illinois have in past years been complying with the City of Chicago Drug, Chemical and Paint Store Wholesale License Tax.

"On June 1, 1960, the California District Court of Appeals, in the case of City of Los Angeles v. William K. Carson, held that the Los Angeles City tax imposed on the number of buses operated within the city during a given period was invalid since it measured the tax by factors not entirely based on the scope of the taxpayer's business within the city. The number of buses used was an 'accidental factor' and the measure of the tax had no reasonable connection with the taxable event or the 'quantum' of business carried on in the municipality. The tax was therefore held to be discriminatory and void.

"Being of the opinion that your privilege license, based as it is on number of employees, may be unconstitutional under the aforementioned

case, we are writing to you direct to ask that you review the question of our divisions' liability.

"We would appreciate hearing from you and ask that your reply be mailed to our New York address, marked for the attention of the writer.

"Thanking you in advance for your prompt consideration of this matter, we are,

Yours very truly,

McKesson & Robbins, Incorporated."

Section 120-4 provides as follows:

Where not more than one person is engaged.....	\$ 35.00
2 to 10 persons engaged.....	65.00
11 to 20 persons engaged.....	125.00
21 to 30 persons engaged.....	190.00
31 to 40 persons engaged.....	250.00
41 to 50 persons engaged.....	375.00
51 to 100 persons engaged.....	500.00
Over 100 persons engaged.....	625.00

Section 120-1 defines "wholesale drug, chemical, or paint store" as any building, room, place, or establishment for any chemicals, paints, and oils, as defined in Section 150-5 of the Code, or any medicines, drugs, therapeutic preparations, druggists' sundries, physicians' supplies, chemicals, or other articles are sold, offered for sale, or kept with the intention of selling wholesale in the city.

Section 120-3 provides that the bureau of heating, ventilation, and industrial sanitation shall conduct an investigation of the premises to determine the fitness and suitability for such business from a sanitary standpoint, and to determine whether or not the premises comply with the code relating to health, safety, and sanitation so as to properly safeguard the lives and health of the employees engaged therein; this section also provides that the division marshal in charge of the bureau of fire prevention shall investigate the premises to determine whether or not they comply with the fire regulations.

Section 120-5 provides that the board of health shall have control over all food and food products intended for human consumption sold or offered for sale in any wholesale drug, chemical, or paint store.

And Section 120-6 provides that any business licensed under the Chapter must be carried on so as to use all measures to safeguard the lives and health of all the persons employed in such establishments, and provides for adequate, convenient washing and toilet facilities for the employees, and restricts the employment of anyone with an active contagious or infectious disease; and also provides for the sanitary assurance of all articles kept for sale, the removal of all waste matter, installation, if necessary, of appliances and devices to prevent the emission of obnoxious fumes, odors, or dust, and the prevention of over-crowdedness on the premises, and the requirement for sufficient lighting, ventilation, heat, and cleanliness, and fresh air for the employees and the premises.

Section 120-8 provides for the maintaining of seats for the use of female employees during their hours of employment for the preservation of their health.

Section 120-9 provides for periodical, as often as possible, inspections by the bureau of heating, ventilation, and industrial sanitation and the compulsion of arrangements necessary for the safety and health of the employees. This section also provides that the division marshal in charge of the bureau of fire prevention, shall periodically inspect each such place of business to determine whether fire regulations applicable are being complied with.

In the case cited, *City of Los Angeles v. William K. Carson, et al.*, 5 West's California Reporter, 356, the defendants were using their buses interchangeably from out of town in their operations. The defendants, for instance, made a total number of seventeen trips into the City of Los Angeles and used fourteen different buses to make the trips. They could have made all of these trips by using only one bus and then the tax would have been a maximum of \$36.00. The City, however, contended that the defendants had to pay the full tax on each of the fourteen vehicles or a total of \$504.00. The Court in that case did say that the *method would be fair insofar as operations of those engaged primarily in the business of furnishing charter bus service within the City*. There you would have the number of buses used in the service of the Company actually engaged in that business in Los Angeles and using their facilities for that purpose only.

This measure of license fee is upheld in the Los Angeles case. It also has been decided in Illinois as being reasonable, valid and constitutional, *City of Chicago v. Willett Co.*, 406 Ill. 286 (287) (290), relative to intracity business. The court said there that a license tax imposed by the ordinance for each cart operated or controlled by every carrier solely within the City according to established fees and schedules may be imposed by the City.

It is our opinion that the annual license fee for Wholesale Drug, Chemical and Paint Stores, measured upon the number of persons engaged in such establishments, is reasonable, constitutional, sound and valid.

LICENSING OF REAL ESTATE BROKERS

*(Housing and Community Services Commission on Human Relations
—E. W. P.—November 3, 1961)*

We have your letter of October 17, 1961, with reference to licensing, investigation or inspection of the good moral character or fitness of a real estate broker. The general provisions relating to Certificate of Registration by the State are contained in Chap. 114½ of Illinois Revised Statutes (1959) which pertains to proceedings on the application, proceedings to revoke or suspend and complaint setting forth grounds for revocation or suspension, for rehearing and for restoration and for review of suspension or revocation.

It is our opinion that all Complainants should go to the State Department of Registration and Education in accordance with the present procedure that you are using. The remedy there in our opinion is complete.

The powers of a municipality to license, tax and regulate brokers, generally, are obtained from Section 23-91 of Chap. 24, Cities and Villages Act. The pertinent sections for real estate brokers are contained in Sections 113-22 through 30. Section 113-23 provides that no license shall be issued to any person who is not duly licensed as a real estate broker by the State of Illinois, and Section 113-24 provides that an application for a license shall be made in conformity with the general requirements relating to applications for licenses. The provisions as to General Licensing is contained in Chap. 101 of the Code, and Section 101-5 provides for an investigation and inspection when the application for the license requires it. It is not required for the reason that when an applicant submits his State license this evidence is sufficient to qualify him. Should it develop that the licensee is violating any Code or his State license is revoked or suspended, this would be good and sufficient cause for the Mayor to revoke the license.

PERMIT FOR EXCESS TRUCK WEIGHT

*(First Deputy Commissioner, Department of Streets and Sanitation—
E. W. P.—February 13, 1962)*

We have your inter-office communication dated February 7, 1962, in which you attach letter dated February 2, 1962 from Attorneys Morgan, Halligan & Lanoff, which communication is in the nature of an application on behalf of their client, Lincoln Bottling Company of 4343 North Central Park Avenue, Chicago 18, Illinois. They advise that their client is primarily engaged in the distribution of Schweppes Quinine Water, the delivery trucks conform to the general pattern of trucks used by other soft drink distributors, the loaded weight approximates 19,000 to 21,000 pounds, the length is 21 feet and width 6 feet; the application is directed to Southport Avenue and North Avenue, Nos. 1406 through 2920, north. The hardship complained about is the inconvenience and hazard of strict compliance with the Municipal Code, if interpreted as inflexible in its rule as to maximum size, weight or load of vehicle upon Southport and North Avenues. The police in this area are ticketing the trucks of applicant because Southport Avenue is marked as a five ton limit from Fullerton to Belmont Avenues, and the applicant states that it is impractical and wholly unreasonable to require their drivers to leave Southport at each intersection and traverse a number of narrow side streets which also causes a bad tie-up in traffic on such streets, including Southport Avenue.

The writer seeks to have you furnish relief by invoking the provisions of Section 27-341 of the Traffic provisions of the Municipal Code which reads as follows:

“(a) When in his judgment an emergency exists, the commissioner of streets and sanitation with respect to streets and highways under the jurisdiction of the city may in his discretion upon application in writing and good cause being shown therefor, issue a special permit in writing authorizing the applicant to operate or move a vehicle or combination of vehicles of a size or weight of vehicle or load exceeding the maximum specified in the laws of the state or otherwise not in conformity with the provisions of this chapter upon any street or highway under the jurisdiction of the city.

“(b) The application for any such permit shall specifically describe the vehicle or vehicles and load to be operated or moved and the particular streets or highways for which permit to operate is requested, and whether such permit is requested for a single trip or for continuous operation.

“(c) The commissioner of streets and sanitation is authorized to issue or withhold such permit at his discretion; or, if such permit is issued, to limit the number of trips, or to establish seasonal or other time limitations within which the vehicles described may be operated on the streets or highways indicated, or otherwise to limit or prescribe conditions of operation of such vehicle or vehicles, when necessary to assure against undue damage to the road foundations, surfaces, or structures, and may require such undertaking or other security as may be deemed necessary to compensate for any injury to any roadway or road structure.

“(e) Every permit issued under the provisions of this section shall be carried in the vehicle or combination of vehicles to which it refers and shall be open to inspection by any police officer, and no person shall violate any of the terms or conditions of such special permit.”

We have omitted subsection (d) because the maximum poundage there exceeds 24,000 pounds and the length and width there is considerably excessive of the applicant's description and therefore (d) is inapplicable.

We are of the opinion that you have the power in this instance to issue the applicable permit provided your investigation discloses the accuracy of the applicant's case. We are not writing direct to the Attorneys because the Code limits us to the rendering of this opinion to your department only, for your direct discretion.

INSPECTION OF LICENSE APPLICATIONS

*(Director, Intelligence Division, Chicago Police Department—E. W. P.
—March 9, 1962)*

We have your letter of January 25, 1962, advising that an investigation is currently being conducted regarding the American Guild of Variety Artists (AGVA) by the Chicago Police Department Intelligence Division. You advise that in connection with this investigation your attention has been focussed upon the Theatrical Booking Agents, which agencies you state are governed by the provisions embodied in the Illinois Revised Statutes, Chapter 48, Par. 197, under Sub-sections a through o, which is commonly referred to as a law regulating private employment agencies.

You request an opinion from our office as to the interpretation as to this particular statute relative to the powers of arrest and enforcement insofar as the Chicago Police Department is concerned, specifically to Sub-sections h, j, l and m of Par. 197. You further request our opinion as to whether or not the license applications that are filed at the Division of Private Employment, Department of Labor, are a matter of public record and open for perusal in their entirety, by law enforcement agencies.

We will answer the second inquiry first. It is our opinion that the license applications, as aforesaid, are available or should be made available for inspection or perusal to the Chicago Police Department. The question as to whether they are a public record in other respects is immaterial for your objective.

With reference to the first inquiry, Par. 197a of the Act, relating to Private Employment Agencies, places the duty, power, jurisdiction and authority to license and regulate employment agencies or agents in the Department of Labor. You also refer to Sub-sections h, j, l and m of Par. 197. 197h refers to theatrical employment agencies and specifies an employer who conducts a cabaret or night-club and the character of the entertainment to be given and the services to be rendered. 197j, amongst other things, refers to houses of ill-repute and persons barred by the agency and the prohibition of sending any female help or servants or performers, etc., to enter any such place and bars questionable characters, prostitutes, gamblers, intoxicated persons or procurers to frequent the agency. 197l deals with the enforcement of the Act through the Department of Labor, but also provides for complaints from others, either orally or in writing, to the Department of Labor. It then sets forth the method of procedure in enforcing the Act. 197m sets forth the power of the Department of Labor through its officers and employees to serve warrants and processes of law issued through the Court or Justice of the Peace or Police Magistrate. However, it describes this procedure in this language:

"... in the same manner as any constable or police officer, may serve and execute such processes, or may arrest on view and without warrant any unlicensed person detected by them actually violating any of the provisions of this Act, and may take such person so offending before any court having jurisdiction of the offense and make proper complaint before such court, which court shall proceed with the case in the manner and form provided by law."

We are of the opinion that under the provisions of this Act that if you are sufficiently armed with the requisite information through the Department of Labor, or if you have direct knowledge of violations of the Act as enumerated in Sub-sections h, j, l and m of Par. 197, that you have the authority to make the arrest and to proceed with the complaint under the provisions of Article 197m. It is our further opinion, however, that taking all of the Act together under consideration that activity in this regard should proceed with the collaboration and cooperation of the officers and employees of the Department of Labor.

BARBER SHOP LICENSE

(City Collector—E. W. P.—March 21, 1962)

We have your letter of March 15, 1962, in which you request an opinion as to the applicability and interpretation of the provisions of Chapter 107.1 of the Municipal Code of Chicago in connection with an application for a Barber Shop license made by the operator of an "established barber college." You quote Section 107.1-1 in your letter as follows:

"A barber shop is defined to mean any building, room, place or establishment wherein the *occupation* is carried on of shaving or trimming the beard or cutting and dressing the hair of patrons for a consideration. The term *shall also include a tonsorial parlor and barber school.*" (Italics supplied.)

You advise that it is the contention of the applicant that no consideration is received for the barbering services rendered by the student barbers, that the only fee paid by the patron for this service covers only the cost of the materials used and that the owner of the premises should not pay a license for the 23 chairs so used by the students.

The ordinance in our opinion speaks for itself. The occupation is that of the owner of the premises who conducts the barber college with the use of the 23 barber chairs and uses the other 5 chairs for professional barbers, and whether or not he receives part consideration or no consideration from patrons is immaterial. Black's Dictionary defines the word "occupation" as "a vocation, which principally takes up one's time, thought, and energies; especially, one's regular business or employment."

It is our opinion that the fee should comply with the provisions of Section 107.1-4 based on the number of barber chairs used on the licensed premises.

"WEIGHMASTERS"

(City Deputy Inspector, Dept. of Weights & Measures—R. P.—June 27, 1962)

The following question has been asked of the office of the Corporation Counsel: "Can the City of Chicago grant a license as Public Weighmaster to a company whose office is within the City of Chicago, but whose scale is located outside of the City limits?"

In 1926, this office had the same question before it wherein a policy decision was rendered allowing such a practice. Since that time, however, the Statute has been changed and many decisions have been rendered by our State Appellate and Supreme Court as well as the Federal Court.

The case law is clear. The City's power does not extend beyond its corporate limits for such purposes. The *City of Des Plaines v. Bolckenhauer*, 383 Ill. 475 (1943), at page 481, the Court held that a request is not enough to give the City extraterritorial power. The rationale as set forth in *City of Rockford v. Hey*, 366 Ill. 526 (1937), at page 532 is that the power to regulate includes the power to license. Therefore, if the scales inspected to meet the standards set and since such regulation is part of parcel of licensing no license can be issued where no regulation or supervision can take place. This tenet is repeated in the *City of Chicago v. Wisconsin Lime Co.*, 312 Ill. 521 (1924). At page 523, the Court states that, "The power to regulate necessarily includes the power to make the regulation effective and to provide for methods of weighing which will secure truthful weights." In *Hauge v. City of Chicago*, 299 U. S. 387 (1937), though coal had been weighed at the mine on State tested scales, it was required to be reweighed by a Public Weighmaster within the City. At page 392, the Court said, "Chicago had no control there (*meaning at the mine*) and such weighing afforded no adequate protection against fraud. The opportunities for manipulation thereafter are obvious." There must be methods to secure the intended result in order that the seller give honest weight and that the buyer receive honest weight and be protected.

This is implicit in the current thinking of the courts that the buyer be protected. To implement protection there must be regulation and inspection. Chapter 147, Weights and Measures, Illinois Revised Statutes, 1961, §§ 4, 12, 13, 14, 15, 16 and 37 all bear on this point and are specific in their direction. Nor can the City of Chicago by contract with neighboring municipalities test the accuracy of their scales as "insuring the accuracy of scales in other municipalities is not a corporate purpose of the City of Chicago" and "not within the powers delegated" to it (Letter of Opinion, Office of Corporation Counsel, Vol. 19, page 71 (1937)).

It is our opinion, because of the foregoing, that the City of Chicago may not grant a license as Public Weighmaster to a company whose scale is located outside of the City of Chicago, though their office is located within the City limits.

SEPARATE LAUNDRY LICENSES

(City Collector—R. J. E.—July 10, 1962)

We acknowledge receipt of your letter of April 12, 1962, addressed to the Corporation Counsel of the City of Chicago in which you request an opinion as to an interpretation of Sections 145-4 and 145-24.6 of the Municipal Code of the City of Chicago as they relate to the following situations:

1. Where a self-service coin-operated laundry establishment is conducted in connection with a "regular" laundry or laundry offering services on the same premises—are two (2) City of Chicago Laundry Licenses required?
2. Where a self-service coin-operated laundry establishment is operated on the same premises in connection with a number of washing machine units or laundry units which are not coin-operated, are separate Laundry Licenses required to cover each separate and distinct operation?

It is our opinion that two (2) separate licenses are required in both of your situations. One license would be necessary to operate the "regular" laundry establishment, while the other would be necessary to operate the self-service coin-operated laundry establishment. This opinion is based upon the fact that reasonable and substantial distinctions exist between a "regular" laundry establishment and a self-service coin-operated laundry establishment. Although both types of establishments are engaged, in a general sense, in the

* Parenthesis added.)

same type of business, they are carried on under different circumstances and with methods which are essentially dissimilar as to furnish a reasonable ground for the owner to obtain two (2) separate licenses, for each operation. The same reasoning would apply to a business which would have self-service coin-operated laundry machines along with units which are not coin-operated.

Your next inquiry was a request for an opinion as to an interpretation of Sections 121-4 and 121-13.6 of the Municipal Code of the City of Chicago as they relate to the following situation:

1. Where dry cleaning services are offered in connection with a self-service coin-operated dry cleaning establishment, are separate licenses required for each dry cleaning operation?

It is our opinion that two (2) separate licenses are required. This opinion is based upon the reasoning that was stated above in answer to your first inquiry.

DISPOSAL OF DEAD ANIMALS

(Purchasing Agent—J. G. O.—February 19, 1963)

In your letter of January 3, 1963, concerning the subject contract, you ask whether or not a successful bidder is required to obtain a license from the Department of Agriculture pursuant to the Illinois Dead Animal Disposal Law. You also ask what licenses and approvals are necessary to establish the responsibility of the bidder under this invitation to bid.

The Dead Animal Disposal Law provides in part as follows:

"Section 2. No person shall engage in the business of disposing of the bodies of dead animals without first obtaining a license for that purpose from the Department of Agriculture, hereinafter called the 'Department.'

Section 4. Application for such license shall be made to the Department on forms provided by it, which application shall set forth the name and residence of the applicant, his place or proposed place of business, and the particular method which he intends to employ in disposing of such dead bodies, and such other information as the Department may require."

In view of Sections 2 and 4 of said Act, in order to be a responsible bidder for the disposal of dead animals, one must have a license as set forth above.

The Dead Animal Disposal Law provides in part as follows:

"Section 11. The following requirements shall be observed in the disposal of the bodies of dead animals:

(1) All carcasses shall be processed or disposed of within 48 hours after being delivered to the plant.

(2) Cooking vats or tanks shall be air tight, except proper escapes for live steam.

(3) Steam shall be so disposed of as not to cause unnecessary annoyance or create a nuisance.

(4) The skinning and dismembering of bodies shall be done within said building.

(5) No uncooked carcasses or portions of carcasses shall be fed to any livestock.

(6) Such portions of bodies as are not entirely consumed by cooking or burning shall be disposed of by burying as hereinafter provided, or in such manner as the Department may direct.

(7) In case of disposal by burying the burial shall be to such depth that no part of such body shall be nearer than four feet to the natural surface of the ground and every part of such body shall be covered with quicklime.

Section 12. The Department shall make such reasonable regulations for the carrying on and conduct of such business as it may deem advisable and all persons engaged in such business shall comply therewith."

Hence, in view of the above, the bidder must present evidence of ability to comply with the regulations of the Department and must further present evidence of ability to comply with any and all local laws or ordinances.

HARDWARE LICENSE

(F. W. T., Jr.—E. W. P.—May 7, 1963)

We have your letter dated May 2, 1963, in which you advise that you represent the Lumber Trade Association of Greater Chicago which includes among its membership various retail lumber yards. Chapter 149 of the Municipal Code requires a license for the operation of a lumber yard or a lumber storehouse and Chapter 135 of the Municipal Code requires licenses for the operation of retail hardware and paint stores.

You call our attention to the clauses contained in Sections 135-6 and 135-11 of which both have the following proviso:

"... provided, however, that dealers or establishments or parts of establishments of a similar nature specifically defined and licensed by other parts of this code shall be exempt from the provisions licensing retail hardware stores, paint stores . . ."

You state that because your clients are licensed under Chapter 149 relating to retail lumber yards and lumber storehouses that the exemption provisions contained in Chapter 135 should exempt your members from licensing under Chapter 135 where the member sells paint and hardware as a part of his operation.

Although the Code provides that the Corporation Counsel shall render opinions only to City officials, we are making an exception in this case because all parties want this question resolved and we have previously rendered an opinion with an analysis of the above quoted proviso. This opinion is contained in Volume XXII of the Opinions of the Corporation Counsel at page 341, and in analyzing the definition of a retail hardware store and the exemptions therein contained we said:

"The proviso contained in the above quoted section obviously is intended to exempt from license dealers in the articles specifically mentioned in section 135-6 who are licensed under other provisions of the Municipal Code, which articles are of a similar nature to those mentioned in section 135-6 and which are specifically defined in other parts of the code."

We are therefore of the opinion that lumber yards and lumber storehouses are not exempted by the proviso and that when these members sell paint and hardware they come within the purview of Chapter 135 and are subject to license under this chapter.

REGULATIONS OF FLOWER PEDDLERS

(*Superintendent, Department of Police—E. W. P.—May 17, 1963*)

We have your letter dated May 9, 1963 in which you request our opinion in answer to your four inquiries as follows:

1. Is the sale of flowers on street corners without a peddler's license in violation of the City ordinances?
2. If a license is required, what are the requirements for such a license and by whom is it to be issued?
3. Within the provisions of existing statutes, is the street corner flower peddler to be considered a wholesale florist?
4. What action, if any, do you advise that the police department take in regard to the widespread practice of selling flowers from the street corners?

In answer to your first inquiry, it is our opinion that the sale of flowers on street corners or other parts of the public way is prohibited. One who engages in this activity cannot obtain a license to do so. Section 160 pertaining to the classification of "Peddlers", as you point out, specifically says:

"No person licensed hereunder (*as a peddler*) shall have the privilege of peddling flowers, growing plants, or floral bouquets or designs." (Italics supplied.)

In addition, Section 128-8 contained in the chapter pertaining to retail florist and wholesale florist reads as follows:

"Except in the case of an itinerant wholesale florist, no license shall be issued except for a fixed location. The sale of flowers, plants or floral bouquets or designs on the public way or at places other than those at which the licensee is licensed is hereby prohibited."

The answer given to your inquiry number "1" encompasses your first three inquiries. The street corner flower peddler cannot be considered an itinerant wholesale florist under the provisions of Section 128-8. The wholesale florist under Sections 128-2 and 128-4 pays an annual license fee of \$100.00 and if he is also an itinerant wholesale florist, whether or not he has a fixed location, he pays, in addition, a separate license fee for each vehicle that he uses in the delivery of flowers, bouquets, funeral floral designs and growing plants to the retail florists who are located at a fixed and permanent business location.

The City has the power to regulate sales upon the streets, sidewalks, public places and municipal property under Section 11-80-20 of the Illinois Municipal Code, and also the power to license, tax, regulate or prohibit hawkers and peddlers, itinerant merchants and transient vendors of merchandise under Section 11-42-5 of the Illinois Municipal Code. This right to regulate these sales on streets and sidewalks, etc., *ipso facto* carries with it the authority not only to impose reasonable restrictions and regulations, but even to suppress sales thereon (*People ex rel. John v. Thompson*, 341 Ill. 166; *City of Chicago v. Collins*, 175 Ill. 445; *City of Chicago v. Rhine*, 363 Ill. 619).

It is our opinion that the Department of Police should enforce the provisions of Section 128-8 which prohibits the sale of flowers, plants or floral bouquets or designs on the public way.

COMBINATION OF VEHICLES

(Central Motor Freight Association, Inc.—A. F. G.—November 19, 1963)

In your letter of November 5, 1963 you set out the following:

"Our member motor carriers have on several occasions been confronted with questions by police officers concerning the legality of operating 60-foot double bottoms (tractor pulling a semitrailer and a full trailer) on Chicago streets.

"As you possibly know, the 1961 session of the Illinois General Assembly amended Section 127 (b) of the Uniform Act Regulating Traffic on Highways to provide for such 60-foot double bottoms to be operated anywhere in the State of Illinois.

"In the 1963 session a bill (Senate Bill 1076) was passed amending Section 133 of U A R T providing for the use of 65-foot double bottom on 4-lane roads and streets under permits to be issued by the Highway Department of the State of Illinois.

"Police officers possibly are confusing the 2 laws as they are requesting truck drivers to produce permits for the operation of the 60-foot double bottoms. If it is at all possible, it would be appreciated if you would examine the 2 statutes, giving your opinion on your findings so that enforcement officials may be governed accordingly."

Prior to 1961 section 127, paragraphs (b) and (c) of the "Uniform Act Regulating Traffic" (Ch. 95½, § 224) provided the following over-all length dimensions for trucks, tractors, etc.:

- (b) Combination of truck tractor and semi-trailer total 50 feet
Truck tractor semi-trailer and one trailer or a truck
in-transit coupled together total 50 feet
- (c) No other combination of vehicles coupled together
shall consist of more than 2 vehicles total 50 feet

To exceed such dimensions provision for the issuance of special permits was provided by section 133 of said Act.

In 1961 said section 127 was amended by combining the provisions of said paragraphs (b) and (c) into one paragraph (b), the effect of which was to increase the permitted over-all length dimensions of the first group (truck tractor and semi-trailer) to 55 feet, to provide that such combination when specially designed to transport motor vehicles may have a length of 60 feet, and that no other combination of vehicles shall exceed a length of 60 feet. The term "combination of vehicles" is defined by section 3 of "An Act in relation to the regulation of traffic" (Ch. 95½, § 100) as follows:

- (e) *Combination of Vehicles.* Every combination of vehicles includes any combination of two vehicles, any combination of a truck tractor with semi-trailer drawing one trailer, and any combination of a truck in-transit drawing two trucks in-transit coupled together by the dual saddlemount method.

In 1963 section 133 was amended, but only insofar as it related to the manner of issuance of such special permits by the state or by municipalities.

Otherwise its effect remained unchanged. Therefore, it is our opinion that special permits provided for by section 133 are required only when the overall combined length of the combination of vehicles in question exceeds the dimensions set out in the 1961 Act above referred to.

Copy of this opinion is being sent to the Chief of Traffic for his information and guidance.

REQUIREMENTS FOR SEVERAL CIGARETTE SALES LOCATIONS

(City Collector—W. J. K.—April 9, 1964)

An inquiry has been made of you by "Homan Services" of Lincolnwood, Illinois, as to whether or not Section 178-22 of the Municipal Code of Chicago requires them to obtain a separate Retail Tobacco Dealer (Cigarette) license for each of the five buildings wherein cigarette vending machines are installed of Sears, Roebuck and Company mail order plant located in the vicinity of Arthington Street and Homan Avenue in Chicago, Illinois. Attached to said inquiry is a map depicting the entire Sears, Roebuck and Company layout and its operations. This map shows there are eight buildings, each one separate from the other and bearing separate street addresses. They extend over a large area and in most instances have public streets separating them.

The pertinent ordinances are cited haec verba, to-wit:

178-9 "The term 'retail tobacco dealer' is hereby defined to mean any person selling, offering for sale, exposing for sale, or keeping with the intention of selling or exchanging at retail, cigarettes or cigarette papers or wrappers in the city.

178-11 "An application for a retail tobacco dealer's license shall be made in conformity with the general requirements of this code relating to applications for licenses.

"The commissioner of police shall cause an investigation to be made of the character and the reputation of the applicant, of whether said applicant is a proper person to be entrusted with the sale of cigarettes, and of whether the *premises* named in said application comply with the police regulations of this code applicable to said business, including the requirement as to location.

178-21 "Before any cigarette-vending machine may be installed for use, and thereafter, before January 15 in each calendar year, it shall be registered as hereinafter provided.

178-21.1 "Application in triplicate for a certificate of registration for each cigarette-vending machine shall be filed in the office of the city collector by the owner, stating his name and address in the city of Chicago, the name of the maker and factory number thereof, the name and city license number of the retail tobacco dealer for whose use it is installed, the *street address of the room* in which it is to be used and the nature of the business which is or will be conducted therein. The original application shall be properly sworn to by the owner.

178-21.4 "A fee of five dollars shall be paid for each certificate of registration. Said certificate shall be valid from the date of issue until December 31 of the calendar year in which it is issued. In the event of substitution of a cigarette-vending machine for one which is obsolete or damaged or not in good working condition, a new certificate and sticker emblem for the same calendar year shall be issued upon application, surrender of the substituted certificate and sticker emblem and payment of one dollar.

178-22 "It is unlawful for any person to install, use or permit the installation or use of any cigarette-vending machine at any place unless the person in control of such place is licensed as a retail tobacco dealer and *unless said location is described* in the registration certificate of that cigarette-vending machine. Any person violating the provisions of this section shall be fined two hundred dollars for each offense and each day of a continuing violation shall constitute a separate and distinct offense.

101-4 "All applications for licenses of any character whatsoever, except those licenses specifically excepted, shall be made in writing to the city collector on a form provided for that purpose.

"Every application for a license shall contain the name of the person desiring the same and the *place of business* of such applicant." . . .

"In addition to such statements, there shall be set forth in said application *the location of the place of business, or proposed location thereof*, for which the license is sought." . . . (Italics supplied.)

Each of these buildings are separate and distinct from one another and each bear a different street address.

The words "premises", "street address", "location", "place of business", and "proposed location thereof" show the legislative intent of the City Council to license each and every premise.

It is our opinion that "Homan Services" must obtain a Retail Tobacco Dealer license for each and every building location in which cigarette-vending machines are installed and used and in addition thereto a certificate of registration for each cigarette-vending machine must be obtained as provided for in Section 178-21.

PRIVATE WATCHMEN

(*Superintendent of Police—M. E. A. & S. R. D.—September 17, 1964*)

We have your letter of August 18, 1964 in which you request an opinion as to the following legal questions:

I.

"Do the ten propositions in the enclosed statement fairly represent the law as stated in the opinions of the Corporation Counsel?"

Each of your ten propositions are quoted below, each proposition followed by our opinion as to its correctness.

"1. A private detective is not per se authorized to carry a pistol, revolver or other firearm on his person or in his vehicle."

A private detective, not otherwise exempt under the provisions of Section 24-2 of the Criminal Code of 1961 (Ill. Rev. Stat. 1963, ch. 38, § 24-2), is not authorized to carry a pistol, revolver or other firearm *concealed* on his person or *concealed* in his vehicle.

"2. Watchmen (including private detectives employed as watchmen) may carry a concealed pistol, revolver or other firearm while actually engaged in the performance of their duties."

The proposition is correct. Ill. Rev. Stat. 1963, ch. 38, § 24-2 (a) (4).

"3. As a result of a recent amendment of Chapter 38, Section 24, Illinois Revised Statutes 1963, watchmen (including private detectives employed

as watchmen) may now carry concealed pistols, revolvers, or other firearms while commuting between their homes and places of employment."

The proposition is correct. Ill. Rev. Stat. 1963, § 24-2 (a) (5).

"4. Private detectives licensed by the state must also be licensed under Chapter 117 of the Municipal Code of Chicago."

Section 117-1 of the Municipal Code of Chicago reads in part that "no person shall advertise or hold himself out for hire as a detective or detective agency without first obtaining a license to engage in the business of private detective or detective agency." Section 608B of the Detective Licensing Act (Ill. Rev. Stat. 1963, ch. 38, par. 608b) provides in part that the private detective business, for state licensing purpose, includes "any individual who shall for hire patrol, watch or guard any residential, industrial or business property or district, or the business of performing the service of such guard, or other person for any of said purposes." The business of providing watchman service is not generally thought to be activities of a private detective or detective agency. Section 117-1, unlike Section 608b, does not expressly incorporate the activities of a watchman into the business of a private detective for licensing purposes. Thus, although a watchman may be required to be licensed by the state as a private detective, he is not so required by the City. For this reason, just because an individual is licensed by the state as a private detective, it does not automatically follow that he must be similarly licensed by the City. The activities of the individual must be analyzed separately under both the state and City law to ascertain what licensing requirements, if any, he is subject to under each governmental authority.

"5. (a) Private detectives employed to guard or protect any building, structure, premises, person, or property within the City must also be appointed and licensed as special policemen under Chapter 173 of the Municipal Code of Chicago."

A private detective so employed is not required to obtain a permit from the City as a special policeman. Section 173-1 of the Municipal Code of Chicago defines "special policeman" as "any person who, for hire or reward, shall guard or protect any building, structure, premises, person, or property within the city" (excluding legally appointed peace officers and special policemen engaged in interstate activities. This provision of the Municipal Code has previously been construed by the Corporation Counsel as not applicable to watchmen. Opinion No. 11054, Volume 22, Opinions of the Corporation Counsel reads in part as follows (p. 351) :

"So far as the inquiry is concerned the agents employed by this particular watch service are not required to be licensed as special policemen under chapter 173 of the Municipal Code because there is no express or implied power in the city to prohibit any person from engaging in the business of furnishing watchmen who are not invested with the powers of conservators of the peace, as are regular and special policemen. * * *"

"(b) Special policemen engaged in protecting persons, passengers and property being transported in intrastate or interstate commerce within the city by common carrier need not be licensed, however."

The proposition is correct. Section 173-2 of the Municipal Code.

"6. A watchman, not employed by a private detective agency, is required to obtain a license as a private detective from the state but not from the city."

This proposition is correct. See our reply to your proposition number 4.

"7. A watchman employed by a watch service is not required to be appointed and licensed as a special policeman as long as the watchmen are not invested with the powers of conservators of the peace."

The proposition is correct. See our reply to your proposition number 5 (a).

"8. A watchman employed to patrol a properly delineated residential or commercial area, as distinguished from a specified premises, is entitled to carry a pistol, revolver or other firearm concealed on his person or in his vehicle."

This proposition is correct. Ill. Rev. Stat. 1963, ch. 38, § 24-2 (a) (4).

"9. The Superintendent of Police may appoint and license a special policeman to perform his duties in a definitely and clearly circumscribed area or to issue a commission for more than one location providing each location is definitely described in the commission."

The proposition is correct. Section 173-3 of the Municipal Code.

"10. A Chicago policeman who obtains secondary employment as a guard or watchman must obtain a license from the state as a private detective. Whether he must also obtain a city license as a private detective depends upon whether his duties require him to act as a private detective (as distinct from a mere guard or watchman)."

The proposition is correct. See point number 5 of our letter to you of July 2, 1964.

II.

"Does the Superintendent of Police have authority to appoint such guards [armed guards of common-carriers accompanying trucks to protect shipments] as special policemen?"

It is our opinion that Sections 173-2 and 173-3 do not require such guards employed by common carriers to be *licensed* as special policemen. However, the Superintendent of Police does have the authority to *appoint* such guards as special policemen.

III.

"Does the Superintendent of Police have authority to require all guards and watchmen to qualify as special policemen?"

It is our opinion that the Superintendent does not have such authority. See our reply to your proposition number 5 (a) in Section I of this letter.

IV.

"If the Superintendent of Police appoints and licenses various persons as special policemen, does the Superintendent of Police or the city of Chicago become civilly liable, directly or as an indemnitor, for tortious acts committed by such persons under color of their authority as special policemen?"

It is our opinion that if the Superintendent of Police is negligent in employing a person who he knows, or who he should know, to be incompetent, criminal, negligent or otherwise unfit to be a special policeman, the Superintendent and the City, or either of them, may become civilly liable in some manner for tortious acts committed by such special policemen under color of authority. However, if the Superintendent did not know, or should not have known, of the special policeman's unfitness, liability to the City and the Superintendent, or either of them, would not accrue unless the Superintendent did something more than merely appoint the special policeman, such as, closely supervise the activities of the special policeman.

V.

"A number of Chicago policemen have accepted secondary employment as guards and watchmen with various commercial establishments or as private policemen for the University of Chicago. Such secondary employment has been approved by the Superintendent of Police. In approving such secondary employment, does the Superintendent of Police or the City of Chicago become

civily liable, directly or as an indemnitor, for tortious acts committed by Chicago policemen in the course of their secondary employment as guards, watchmen, or private policemen?"

It is our opinion that the Superintendent and the City of Chicago, or either of them, may become civily liable for tortious acts performed by Chicago policemen in the course of secondary employment as guards, watchmen or private policemen if such acts are performed by the policeman under color of his authority as a police officer. Thus, a police officer, technically "on duty 24 hours a day", who effects an arrest in a tortious manner or who uses his police authorized revolver in a tortious manner during his secondary employment may render the City of Chicago liable for his actions. Ill. Rev. Stat. 1963, ch. 24, §§ 1-4-5 and 1-4-6.

YEARLY BOND POSTING BY DRAIN LAYERS

(Deputy Commissioner for Sewers—W. M. Z.—December 28, 1964)

Please refer to your communication of December 3, 1964 with reference to information covering a drainlayer's bond requested by the Ohio Casualty Group of Insurance Companies.

Our Code Chapter 119 provides as follows:

"119-4. Before delivery of any drain layer's license to any applicant therefor, such applicant shall execute to the city a good and sufficient bond in the sum of ten thousand dollars, with sureties to be approved by the Commissioner of water and sewers, conditioned for the faithful observance and performance of all the provisions of this code or any rule or regulation of the department of water and sewers concerning or regulating the business of drain laying, and conditioned further to indemnify, save, and keep harmless the city from any loss, cost, damages, expense, or liability of any kind whatsoever, which the city may suffer, or which may accrue against, be charged to, or recovered from the city or by reason of any act or thing done by the person so licensed, or by any negligence in the execution or completion of any work done by such drain layer, or by or on account of any improper work done under and by virtue of the authority of the license so issued. Said bond shall be filed in the office of the commissioner of water and sewers.

"119-5. Any person licensed as a drain layer shall be entitled to have his license renewed without filing an application, upon payment by him of the annual license fee and the renewal of the bond herein provided for."

It is our opinion that a new bond is required yearly.

LICENSE FOR DETECTIVE

(City Collector—M. E. A. & S. R. D.—June 21, 1965)

Reference is made to your letter of June 15, 1965 in which you request our opinion as to whether the Monarch Detective Agency, Inc., must be licensed pursuant to Section 117-1 of the Municipal Code of Chicago.

The pertinent language in Section 117-1 is as follows:

"No person shall *advertise or hold himself out for hire* as a private detective or a detective agency without first obtaining a license to engage in business as a private detective agency." (Emphasis added.)

The president and operator of Monarch Detective Agency, Inc., is Mr. James A. Pikoulas. Mr. Pikoulas conducts the agency's business out of his home located at 10041 S. Kilpatrick Avenue, Oak Lawn, Illinois. He holds a State of Illinois license as a private detective.

The agency is listed in the yellow pages of the Chicago telephone directory at 25 E. Washington Street, Chicago, Illinois. The listing also notes a Chicago telephone number. In addition, the Monarch Detective Agency has an advertisement in the yellow pages of approximately 5½" x 2" in size. The Chicago telephone number of the agency is listed in this advertisement although no business address is noted there.

Apparently, there is no evidence to refute Mr. Pikoulas' claim that he operates the agency solely out of his home in Oak Lawn. He further states that the telephone number listed in the yellow pages is that of an answering service and that all telephone calls are forwarded to his Oak Lawn telephone number. He maintains that a Chicago telephone number is a requisite for a listing in the yellow pages. However, both Mr. Pikoulas, in his letter to you, and you, in your letter to us, fail to observe that in the yellow pages listing, the business address of the agency is designated as 25 E. Washington Street; whereas, the address of the telephone answering service used by the agency is 24 N. Wabash Avenue. Thus, above and beyond satisfying the requirement for being listed in the yellow pages, the Monarch Detective Agency, Inc., holds itself out as a Chicago detective agency.

Section 117-1 does not require that a detective agency *actually do* business in Chicago as a pre-requisite for licensing, but states that either advertising or holding out as a detective agency in Chicago necessitates licensing. As noted above, Monarch Detective Agency, Inc., has a Chicago telephone number and a Chicago address other than that of its answering service. In our opinion, this Chicago listing in and of itself indicates that there is a "holding out for hire" as a detective agency in Chicago. Moreover, its advertisement in the yellow pages leaves no doubt that Monarch Detective Agency, Inc., is "advertising" in the City of Chicago.

For these reasons, it is our opinion that Monarch Detective Agency, Inc., falls within the scope of Section 117-1 of the Municipal Code of Chicago. You should take the appropriate action to assure that the proper license is obtained.

LICENSE FOR SOAP MANUFACTURING

(City Collector—E. W. P.—July 30, 1965)

We acknowledge receipt of your letter of July 26, 1965, in which you enclose copy of your letter of February 2, 1965, with copy of letter from Armour and Company of January 25, 1965. You request our opinion as to whether or not the operations now being conducted at the 31st Street plant of Armour and Company, as described by the representative of Armour and Company, and the product thereof, are within the purview of Section 150-27 of the Municipal Code of Chicago relating to soap manufacturers. You also ask our opinion as to whether or not the described detergent dry-spraying operation of Armour and Company at its 31st Street plant is subject to the provisions of Section 150-28 of the Municipal Code which is also relative to licensing the business of manufacturing soap.

Armour and Company, in their letter, advise that they have discontinued in the year 1964 their previous operation of processing soap at this address and have moved their location for this purpose to Montgomery, Illinois. They also state that the operation conducted at the 31st Street plant is now entirely a detergent spray-drying operation and that in this latter process they receive a base material purchased from outside suppliers and merely change it from a liquid state to a granule state by drying operation.

They advise in the third paragraph of their letter that the kettle processing operation, which operation is the base for our license fees in Section 150-30, has been discontinued at the Chicago plant. However, in the fourth paragraph of their letter they do advise that the spray-drying operation is performed on soap and we can only assume that the said spray-drying operation is part of the processing and manufacture of soap.

Section 150-32 provides that the Board of Health shall periodically inspect these establishments and in answer to your first inquiry as to whether or not the operations at the 31st Street plant of Armour and Company come within the purview of Section 150-27, we are of the opinion that this question should be determined by the Health Department through their Division of Regulatory Inspection of Sanitary Practices. We take the same position in answer to your second inquiry as to whether or not the detergent spray-drying operation of Armour and Company at its 31st Street plant comes within the purview of Section 150-28 which provides for the licenses of persons engaged in the business of manufacturing soap.

We are sending a copy of this letter to Mr. Edward King, Chief Sanitary Officer, Division of Regulatory Inspection of Sanitary Practices, Board of Health, requesting him to make an inspection of the 31st Street plant and advise you of the determination of the Board of Health as to the proper category of the plant in their present operation.

Should this question remain undetermined when you receive the report from Mr. King and you wish our opinion further, based on the inspection of the Health Department, we shall be very pleased to serve you.

SLAUGHTERING LICENSE

(City Collector—L. H. G.—November 17, 1965)

We have your letter of November 5, 1965, requesting an opinion from this office regarding an application filed by Wimp Packing Company. In the first paragraph of your letter you state as follows:

"This office is now in receipt of an application filed by Wimp Packing Company, a Division of Russell Packing Co., Inc., for a license (Class I) to conduct a slaughtering, packing, rendering and glue making establishment at 1119 West 47th Place, for the period expiring December 31, 1965."

Further facts stated in your letter disclose that a Slaughtering, Packing and Rendering Establishment (Class I) license No. 21 was issued to Wimp Packing Company, a Division of Russell Packing Company, for premises at 1117-1135 West 47th Place for the period expiring December 31, 1964; and further disclose that on June 25, 1964, the Wimp Packing Company, a Division of Russell Packing Company, Inc., assigned said license No. 21 to Hygrade Food Products Corp. and Transfer License No. 177 was issued in connection with the said license assignment. The letter quotes Section 171-5 of the Municipal Code of Chicago, which is as follows:

"Thirty days before any license is issued under this chapter to an applicant who has not been previously licensed to engage in such business, the City Clerk shall mail a notice of such application to the alderman representing the ward in which the applicant intends to engage in such business, and to the alderman whose wards or any part thereof are within a radius of three miles from the proposed location for which application is made to carry on such business."

The crucial words in that ordinance are "to an applicant who has not been previously licensed to engage in such business, . . ." In interpreting those crucial words, it is our opinion that the Wimp Packing Company, by assigning the license as aforesaid stated, completely removed itself from the status of an operator of the business described in said license No. 21, and that the present application by the Wimp Packing Company is by one who has not been continuously in the operation of a business described in said license No. 21 and is therefore one who has not been previously licensed and under the terms of Section 171-5 of the Municipal Code.

It is also our opinion that the City Clerk should mail a notice of the present application of the Wimp Packing Company to the Alderman representing the Ward in which the applicant intends to engage in such business, and to the Alderman whose Wards or any part thereof are within a radius of three miles from the proposed location for which application is made to carry on such business.

LICENSE FOR OCCASIONAL REAL ESTATE BROKER

(City Collection Office—R. J. E. & M. S.—December 9, 1965)

This is to acknowledge your letter of November 15, 1965, wherein you request our opinion regarding the question of whether or not a real estate broker licensed by the State of Illinois, who is a non-resident of the City of Chicago and who has no place of business in the City of Chicago, must obtain a City of Chicago Real Estate Broker License as provided in Section 113-23 et seq. of the Code in order to handle an occasional transaction concerning real estate in the City of Chicago.

It would appear from various decisions that the ordinance in question expressly declares it unlawful and prohibited to transact a brokerage business without a city license. See *Douthart v. Congdon*, 197 Ill. 349; *Whitfield v. Huling*, 50 Ill. App. 179; *Hustis v. Picklands*, 27 Ill. App. 270. This application is based upon transaction of business in Chicago, rather than the location of the property. *First National Bank of Willstadt v. Freant*, 7 Ill. App. 2d 204, 1955.

The license law is not and does not purport to be, a method of taxing real estate transfers, rather, by its express terms, it imposes the license on the occupation, where the transaction occurs.

It is conceivable that a broker licensed in one city, might have a series of sales of property in another municipality so that a court would regard him as one carrying on a business in the latter. However, it has been stated as a general rule that an isolated local sale by a foreign broker is not subject to a local license law, 8 Am. Jur. "Brokers", section 156.

In the light of the long line of decisions and leading texts supporting the proposition that an occasional transaction does not require a broker to obtain a license and comply with a local ordinance, it is our opinion that the present ordinance should not be applied to a person handling an occasional transaction in the City of Chicago.

DISCOTHEQUE CLASSIFIED AS CABARET

(*Director, Vice Control Division—M. M.—March 8, 1966*)

Your communication of December 15, 1965 requesting an opinion as to whether premises providing Discotheque (Go-Go) type of entertainment require a Public Place of Amusement Class III license in accordance with Chapter 104.1 of the Municipal Code of Chicago has been referred to me for reply.

Chapter 104.1 is entitled Public Places of Amusement. Paragraph 104.1-1 sets forth the definitions used in said chapter, and paragraph 104.1-2 sets forth the license requirements.

Paragraph 104.1-7 divides all public places of amusement into three classes. One of these, Class 3, is entitled "Cabaret".

Because there is no definition of "Cabaret" contained in any of the aforementioned paragraphs, or, as a matter of fact, anywhere else in Chapter 104.1, the dictionary definition must be used.

Webster's Dictionary defines "cabaret" as a "restaurant" providing entertainment and space for dancing."

Black's Law Dictionary defines "cabaret" as "A room where musical entertainment is permitted in connection with restaurant business."

Words and Phrases, Vol. 6, "cabaret" contains no reference to Illinois decisions. All those cited are New York State or Federal decisions, and are represented by the definition in *Geer v. Birmingham*, D. C. Iowa, 88 F. Supp. 189 at page 193:

"A 'cabaret' is a cafe or restaurant where patrons are entertained by performers who dance and sing after the practice of certain French taverns."

It would appear, therefore, that unless the places where this type of entertainment is provided are restaurants, they do not fall within the "Class 3. Cabaret" classification of Chapter 104.1-7 so as to require a Public Place of Amusement license.

Returned herewith is your file herein, including the photographs attached thereto.

HOSPITAL DEFINED

(*Commissioner of Health—M. C.—April 13, 1966*)

This is to acknowledge the receipt of your letter to this office in which inquiry is made as to whether or not Dr. A. I. Jackman's Psychiatric Clinic at 861 North La Salle Street, Chicago, may be classed as a "hospital" and should be licensed as such.

Chapter 137-1 defines the word "hospital" to mean

"any institution or place used for the harboring or the reception, care, and treatment, including treatments known as 'rest cure, physical culture, hydropathic massage, and all other forms of drugless treatment of two or more persons suffering from or afflicted with any mental or physical disease, bodily injury, alcoholic, or drug addiction;' or any institu-

tion or place for care of one or more pregnant women during confinement; or any place or establishment advertised, announced, conducted, or maintained under the name of 'hospital' without a qualifying statement that such a hospital is not intended for human beings."

Chapter 111½, Section 144 (subsection (b)):

"* * * the term 'hospital' includes general and specialized hospitals, tuberculosis sanatoria, mental or psychiatric hospitals and sanatoria and includes maternity homes, lying-in homes, and homes for unwed mothers in which care is given during the labor."

In view of the fact that Dr. Jackman and his nurse are in charge of the Clinic, and carry out psychiatric treatments, said Clinic must be classed as a "hospital" and it cannot be maintained, conducted, and operated as such without first obtaining a license as provided under Chapter 137 of the City Code of Chicago.

GENERAL BROKER

(H. S.—M. S.—May 25, 1966)

This is to acknowledge receipt of your letter addressed to Mr. Raymond F. Simon, Corporation Counsel, Chicago, Illinois, dated May 7, 1966.

In your letter you inquire whether a real estate broker's license of the State of Illinois and the City of Chicago is sufficient to engage in the business of a broker to sell businesses or whether it is necessary to acquire a business broker's license.

Section 113-1 of The Municipal Code of Chicago provides:

"The words 'general broker' are hereby defined to mean any person other than an employee of the principal for whom the business is done that negotiates, buys, sells, trades, leases, or handles for another, on a commission basis, or on the basis of compensation in proportion to the amount of the transaction, any stocks, bonds, mortgages, loans, investment certificates of indebtedness, foreign exchange letters of credit, steamship transportation ticket, grain, provisions, produce, livestock, goods; wares, merchandise or any other commodity, article or property (except real property), whether similar or dissimilar to those herein mentioned, or acts through the medium of another licensed broker in the capacity and for any of the purposes aforesaid."

The above quoted ordinance makes it necessary to acquire a general broker's license to engage in the business of a broker in the buying and selling of businesses for a commission or compensation regardless if one is a real estate broker or not.

DAY CARE CENTER DEFINED

(Christian Action Ministry—M. H.—July 12, 1966)

This is to acknowledge receipt of your letter to this office in which you state that you represent several churches engaged in pre-school activity with small children, two and one-half hours a day for three mornings a week, which is an extension of your Sunday and Bible Schools and, as such, cannot be classified as a "day-care center".

Chapter 158 of the Municipal Code of the City of Chicago defines "day-care centers" as follows:

"'Day Care Center' is hereby defined as any institution or place in which are received three (3) or more children, not of common parentage, apart from their parents or guardian, between the ages of 2 years and 6 years for care during part or all of a day but not later than 9:00 P. M. The term is further construed to include similar units operating under any other name whatsoever with or without stated educational purpose."

In view of the above definition of day-care centers, it is our opinion that that portion of your activity which concentrates on working with small children two and one-half hours a day for three mornings a week must be classed as a "day care center", as previously advised at a meeting in the office of Health Commissioner, Dr. Samuel L. Andelman.

LYING-IN-HOSPITAL

(Board of Health—M. C. H.—April 14, 1967)

This is to acknowledge receipt of your letter to this office in which the question is asked whether or not a dispensary located in Chicago-Lying-In Hospital should be included in their hospital license and whether or not a dispensary located on a site separate from that hospital must have a separate license.

Chapter 118-2 provides as follows :

"It shall be unlawful for any person other than the regularly constituted authorities of the United States, the state, the county, or the city to conduct or operate any dispensary as above defined within the city without first obtaining a license therefor."

Chapter 118-5 provides as follows :

"Dispensaries which are operated without a charge being made for the care of patients shall be exempt from the payment of a license fee. Operators of such dispensaries shall be required to apply for a license as herein provided, and such application shall be accompanied by an affidavit stating that no charge is made for the care of patients."

In view of the above, it is our opinion that all dispensaries within a hospital, a dispensary operated by a hospital being located on the same geographical site as the hospital or a dispensary located on a site separate from the hospital within the City of Chicago must obtain a license therefor with this exception, that dispensaries operating without a charge being made for the care of the patients shall be exempt from payment of a license fee.

CHAPTER VII—BUILDING AND ZONING

Section A. BUILDING

JURISDICTION OVER DRIVEWAYS

(Commissioner, Department of Streets & Sanitation—E. W. R.—May 22, 1961)

We have before us a letter dated May 16, 1961, which apparently is a duplicate original of a letter sent to you of the same date from Mills, Finnegan and Crane, Attorneys, at 29 South La Salle Street, pertaining to Driveway Permit No. XC-5512, 117 N. Wells Street, Chicago, Illinois.

The letter describes the full address of the property as 115-119 North Wells Street, which is improved with a building known as the Industry Building, with a frontage of the property of 60 feet on Wells Street and a depth of 111 feet. The lower ground floor of the building at the street level was divided into two stores, one occupied by Tri Par Radio and Appliance Company and the other by the "Wolf" restaurant, and the rentals derived from the property for the past several years approximated the sum of \$1700.00 per month. The written leases of the tenants, in force for many years, expired by their terms on April 30, 1961, and about one year ago the owner, having in mind demolishing the buildings and converting the premises into a parking lot, decided against renewing the leases of any of the tenants, although the latter were anxious that the same be renewed, even at increased rentals.

Pursuant to these plans, on September 27, 1960, the owner of the property applied to the City for a "Driveway" permit in connection with the operation of the contemplated parking lot and this permit was issued (No. XC-5512) to the owner on October 20, 1960.

Thereupon, the owners notified their tenants that the leases would not be renewed when the same expired and entered into a contract with State Wrecking Company looking to the demolition of the premises immediately after the same would be vacated by the tenants. The owners then entered into a lease with prospective lessees for the use and occupancy of the premises as a parking lot, which lease is in full force, and the lessees occupancy thereunder commencing immediately upon the completion of the demolition of the buildings now in process and when the premises have been made suitable for the prescribed use.

Thereupon, to carry out the terms of its new lease, the owners applied to the City for a permit for the erection of a small suitable structure on the premises to be used by the lessees of the parking lot for the checking in and out of cars of its customers, as well as carrying on the other details of the business. The tenants vacated the premises and, pursuant to the terms of the contract, the Wrecking Company proceeded to and is presently engaged in the demolition of the buildings.

On May 15, 1961, the Eugene S. Pike Estate Land Trust, the owner of the building, received the following letter:

"Re: Driveway Permit No. XC-5512
117 N. Wells Street, Chicago, Illinois

Dear Sir:

This letter is to inform you that due to amendments to the Chicago Zoning ordinance at a meeting held on April 10, 1961, parking lots and garages fall into special uses under Article 9.4-3, Items 5 and 6. Your driveway permit XC-5512 is, therefore, revoked.

Yours very truly,

/s/ T. R. Marcyan
Traffic Engineer in
Charge of Driveways."

The contents of the letter discloses without any doubt that at the time the "Driveway" permit was issued it was done in contemplation of the use of the premises as a parking lot. The owner of the property, aside from the loss of the rental and other incidental expenses, has assumed obligations which will exceed, in cost, the sum of \$15,000.00 covering the demolition of the premises and other expenses incident to the conversion of the property for the use for which it is now leased.

The statement given by Mr. Marcyan in his letter of May 15, 1961, that parking lots and garages fall within special uses under Article 9.4-3, Items 5 and 6, is correct and the ordinance became effective on May 4, 1961. The owner of the property might very well obtain a permit through the Zoning Board of Appeals in accordance with the provisions of the ordinance relative to special uses. However, it is our opinion that, due to the expenses incurred by the owner in reliance upon the issuance of a permit and the commitments which they have undertaken, that they have acquired a vested right in obtaining a permit for the parking lot and in using the proposed driveway in connection with that activity, without the necessity of going before the Zoning Board of Appeals (*Deer Park Civic Association v. City of Chicago*, 347 Ill. App. 346; *1550 North State Building Corp. v. City of Chicago*, 15 Ill. 2d 408).

It is, therefore, our opinion that the "Driveway" permit should be restored and that the proper permit should be issued for the use of the premises as a parking lot.

RECEIVERS FOR UNSAFE REAL ESTATE

(Deputy Commissioner, Department of Buildings—L. A. W.—October 27, 1961)

In your letter of September 26, 1961 to Mr. Melaniphy, you refer to the recently amended Section 23-70.2 of the Cities and Villages Act and Section 39-12 of the Municipal Code of Chicago, dealing with demolition of slum properties. You ask for an opinion as to whether or not the City Real Estate Agent could be named as a receiver in those properties requiring repairs and where the owners fail or neglect to do so.

You point out the fact that if the City Real Estate Agent could be named receiver in such cases, there could be a saving of the 6% receivership fee. Rule 10.1 of the Rules of Practice of the Circuit and Superior Courts prohibit the appointment of an employee or an agent of a party to a suit from acting as a receiver. Accordingly, we are of the opinion that the City Real Estate Agent could not act as receiver in a suit wherein the City of Chicago is plaintiff.

NURSING HOMES

(Deputy Commissioner, Department of Buildings—E. W. P.—December 6, 1961)

We acknowledge your letter of December 1, 1961, in which you refer our attention to certain rules and regulations known as the "Minimum Standards, Rules and Regulations for Nursing Homes" placed in force by the State of Illinois on July 1, 1960. You advise in your letter that these minimum standards prohibit the transfer of ownership affecting the subject matter unless said nursing homes are brought into full compliance.

The Minimum Standards, Rules and Regulations are contained in sixteen divisions. Divisions 1 through 10, both inclusive, 13 and 16 apply standards to all nursing homes according to their functional activities. Division 11 pertains to standards for buildings and grounds and bears the title of "Buildings and Grounds." Various sections in this division relate to every building for which the applicant has not made application for a Nursing Home License prior to the promulgation date of the revised standards and every building licensed as a nursing home. The first classification relates in part to the location of the new nursing home and its height limits, and the other sections relative thereto apply to minimum square feet for bedrooms, distances between walls, width of corridors, etc.

Persons owning homes can either be an individual, partnership, association, firm, corporation, municipality, political sub-division, trust or estate, or any other entity, and an applicant means any person making application for license. There is no discrimination in the standards as between entities, nor could there lawfully be any difference as to the identity of ownership, except as to the necessary qualifications of the applicant to conduct the home.

It is our opinion that the application of the minimum standards differs in buildings operating as nursing homes prior to the promulgation date of the revised Minimum Standards, Rules and Regulations, and those buildings constructed as, or converted to, a nursing home subsequent to the promulgation date of the revised Minimum Standards, Rules and Regulations. All of the standards must be met by newly constructed buildings or converted buildings and the applicant in these instances must comply with all the standards including the revised standards as of the date of application, but where the applicant is requesting a permit for a building that has been licensed as a nursing home he must meet the standards as specified in the regulations for existing nursing homes. This demarcation is not only set out in Division 15 on the subject of new construction, additions or remodeling, but is also in our opinion referred to and distinguished in Divisions 11 and 12. It is our opinion that the language in these two divisions, referring to every building for which the applicant has not made application for a Nursing Home License prior to the promulgation date of the revised Minimum Standards, Rules and Regulations should be considered as synonymous in its intent and operation with the language in Division 15 pertaining to buildings constructed as, or converted to, a nursing home subsequent to the promulgation date of the revised Minimum Standards, Rules and Regulations.

The applicant and his management must, of course, meet the qualifications as set forth in the Minimum Standards, Rules and Regulations, but the applicant for license of an existing nursing home is not precluded from obtaining the same privileges as the licensee of a nursing home who applies for renewal of the license.

GLASS PANEL DOORS

(Commissioner, Department of Buildings—E. W. P.—December 21, 1961)

We have your letter of December 18, 1961, in which you request our opinion as to the enforcement of Section 78-15.9(b) of the Municipal Code in view of the decision of Hon. Donald McKinlay, Judge of the Superior Court, on December 13, 1961. The said Section reads as follows:

“(b) *Glass panel exits prohibited after five years.* Five years after the effective date of this housing code, no exit in any building may be counted as a required exit for a family unit unless every family unit for which it is an exit has access to such exit without passing through any other family or rooming unit.”

The Court order refers to both Sections, 78-15.9(a) and 78-15.9(b), and provides as follows:

“It Is Therefore Declared and Adjudged that Section 78-15.9(a) of the Municipal Housing Code of the City of Chicago which was enacted by the City Council of the City of Chicago on June 20, 1956, is valid and within the power and the discretion of the City Council of the City as to new construction or remodeling of buildings subsequent to the enactment of said ordinance.

“It Is Further Declared and Adjudged that said Section 78-15.9(b), in its application to buildings with such doors constructed or remodeled prior to the enactment of said Section, is unreasonable, arbitrary and invalid as to glass panel doors which were legally and properly installed prior to the enactment of said ordinance, and properly maintained.”

The Corporation Counsel has decided to appeal the second provision of the order and notice of appeal will be filed by our Appeals Division as soon as the file is completed in readiness for this procedure. However, in the meantime, it is our opinion that Section 78-15.9, subsection (b), should be enforced to the extent permissible under the order of the Court. The order provides that those glass panel doors which were legally and properly installed prior to the enactment of the ordinance of June 20, 1956 and are properly maintained is unreasonable, arbitrary and invalid. Therefore, the enforcement of Section 78-15.9, subsection (b), under the context of the Court order as to any glass panel doors which were not legally and properly installed prior to the enactment of the ordinance and which are not now properly maintained, is reasonable and valid. It is our opinion that the phrase “legally and properly installed” cannot be construed in any other light but that a permit must have been issued for the installation. Furthermore, in the event that the panel doors are not now properly maintained, Section 78-15.9, subsection (b), can be enforced.

It is incumbent upon the owner of the property or anyone in possession to prove that the glass panel door was installed with the benefit of a permit and was properly installed and is now being properly maintained. It is our further opinion that the Section is enforceable and should be enforced, but only in the light of the order of the Court as heretofore set forth.

STORAGE OF OIL TANKS

(Commissioner, Department of Buildings—E. W. P.—January 5, 1962)

We have your letter dated September 21, 1961, relative to the above location in which you advise that you have before you an application for a permit to install (2) 250,000 gallon oil tanks above ground in an existing bulk filling station. The site is zoned M3-3 and the present station contains (21) 12,000 gallon gasoline tanks in use, (3) 12,000 gallon gasoline tanks not in use and (1) 12,000 gallon kerosene tank, making a total capacity of 300,000 gallons of underground storage tanks.

Section 60-52 of the Municipal Code permits 750,000 gallons in any storage yard, and Section 60-10 permits a tolerance of 10% capacity. The proposed additional storage would give the yard a total capacity of 800,000 gallons, which would be within the permitted capacity after making the 10% tolerance allowance. It is noted in the correspondence attached to your letter that there will be no gasoline stored in the new area, but that the tanks would contain heating oil products. The site herein is triangular shaped and is bordered by the North Branch of the Chicago River to the West; Kingsbury Street and the Chicago, Milwaukee, St. Paul & Pacific Railroad tracks on the East; a vast stretch of vacant property to the South and the Pilibrick Co., manufacturers of brick compound, to the North.

You direct our attention to the clearance required for the two new 250,000 gallon tanks as set forth under Section 60-8 and Section 60-10 as revised in 1960. This you compute as 176 feet from the lot line, which includes the line on the East side of the North Branch of the Chicago River which is the West boundary of the subject property. You further advise that before the revision of the Code the safety clearances were taken from the opposite side of every adjoining and adjacent public way. The safety clearance on the plot which you submitted is indicated as 105 feet from the center line of the tanks to the lot line of Kingsbury Street and 105 feet to the shore line of the Chicago River. Kingsbury Street is 66 feet wide according to the Sanborn maps. However, the Sanborn maps show a width of approximately 200 feet of the North Branch of the Chicago River at this point.

Taking into consideration the wide expansion of the river, the contour of this particular location and the established use and the contemplated storage under the provisions of the Code when the use was originally established, it is our opinion that the safety clearance provided is adequate and meets the requirements of the Code and that the plans of the Applicant as they reflect the capacity and the safety clearance should be processed and a permit issued, provided all other ordinances are complied with.

This opinion governs this particular location and set of facts and has no force or effect on any other application.

RESPONSIBILITY FOR INSPECTION FEES

(City Comptroller—E. W. P.—March 22, 1962)

We acknowledge your letter of March 15, 1962, advising that you have consolidated in statement form all amounts of inspection fees, permit fees and other charges against taxpayers for the years 1957 through 1960 in order to determine the total due from each individual or company covering a specific property. You estimate that about 31,980 statements will be mailed within a week or so and that it is necessary that you have answers to certain questions which you have enumerated and that you anticipate many inquiries.

You first request an opinion as to whether or not a new owner is responsible for inspection fees such as boiler inspection, refrigeration inspection, elevator inspection, electric signs, driveway fees, building inspection, ventilation inspection and air pollution inspection or whether you must look for collection to the parties who owned the property at the time said annual inspections were made. You further explain in your inquiry that these fees are not recorded as liens against the property.

It is our opinion that these inspection fees are incidents to the property itself and that we should look to the present owners for payment. In the event that the owner at this time feels that he should be reimbursed by the seller that is a matter of private concern, but the fees were charged for the maintenance of the property and were prospective at the time of the inspections. Real property and personal property, tangible and intangible, may be regulated under the Municipal police power. These fees properly proportioned in the various type of inspections are regulatory measures under the police power.

Relating to the second inquiry which reads as follows:

"Are 1960 and prior driveway permit fees included in the injunction obtained by the filling station operators or does the injunction cover 1961 fees only? The large oil companies paid the 1960 fees but many of the individual operators have not paid."

There was no injunction but there was an agreement made in open Court that we would not proceed against those operators who were made parties to the suit provided that deposits were made by the individual operators to cover the 1960 and 1961 fees, which would be applied toward payment of the fees in the event of a judgment in favor of the City of Chicago. This was incorporated into a Court Order, copy of which is attached hereto. We are also enclosing a copy of the list of the operators who made these deposits. You should proceed against all others who have not paid the fees for 1960 and 1961 and all prior years.

The third inquiry that you make is with reference to prior liabilities and is as follows:

"If the property has since been condemned by governmental agency, do all prior liabilities cease to exist or is the old owner still responsible therefor? What is the effective date (a) the date suit is filed (b) date of actual acquisition through condemnation approval."

It is our opinion that the old owners are still responsible for prior liabilities to the date of the judgment order for condemnation.

DETERMINATION OF STORIES

(Assistant Zoning Administrator—E. W. P.—April 26, 1962)

We have your letter dated April 25, 1962, in which you advise that you are confronted with a situation which has to do with side yard requirements in R-1 and R-2 Districts, particularly with reference to applications for permits to erect buildings which you consider technically to be one-story buildings. You used as your zoning guide and requirement Sections 7.8-1(2) and 7.8-2(2). These provisions read as follows:

"7.8-1

(2) One-family Detached Dwellings, over one-story. On a lot improved with a one-family detached dwelling of more than one story, a

side yard shall be provided along each side lot line. The combined widths of both side yards shall not be less than 15 feet, and neither side yard shall be less than five feet in width. However, on a lot of record on the effective date of this comprehensive amendment which is less than 50 feet in width, the combined widths of both side yards shall not be less than 30 per cent of the lot width and neither side yard shall be less than 10 per cent of the lot width, but in no case less than three feet.

"7.8-2

(2) One-family Detached Dwelling, over one story. On a lot improved with a one-family detached dwelling of more than one story, a side yard shall be provided along each side lot line. The combined widths of both side yards shall be not less than 12 feet and neither side yard shall be less than four feet in width. However, on a lot of record on the effective date of this comprehensive amendment which is less than 40 feet in width, the combined widths of both side yards shall be not less than 30 per cent of the lot width and neither side yard shall be less than 10 per cent of the lot width, but in no case less than three feet."

You advise in your letter that a bi-level building is considered by most recognized builders as being a one-story structure and you quote Section 51-1.1 (d), which reads as follows:

"The number of stories shall be taken as the actual number of stories above grade. The following shall not be regarded as stories:

(1) Basements having a ceiling height of not more than seven feet above grade, when permitted by zoning ordinance.

(2) Mezzanine floors or balconies having an area not exceeding twenty per cent of the floor area of the story in which they occur. In one story building of Types II, III-A or III-B construction when unlimited areas are permitted, mezzanine floors shall not exceed 8,000 square feet in area.

(3) Enclosed monitor spaces in Industrial or Storage Units used only for employees' toilets, lockers or similar uses."

It is our opinion, based on Section 51-1.1(d), that the side yard requirements should be governed by the regulations concerning a one-story building, even though "bi-level" is a descriptive term.

HOTELS

(Deputy Commissioner, Department of Buildings—E. W. P.—May 10, 1962)

With reference to the conference held in the office of the Corporation Counsel sometime ago on the subject of Chapter 137.1 relating to Hotels, and your request for an opinion as to the validity and enforceability of the subject Chapter, the power for regulation and supervision is authorized by Illinois Revised Statutes (1961), Chapter 24, Section 11-30-5, which provides as follows:

"In order to promote the public health and safety and the health and safety of the occupants of the premises herein defined, the corporate authorities of each municipality may regulate and provide for supervision of every building, structure or any part thereof used or held out to the public to be a place where sleeping accommodations are furnished or maintained for 20 or more persons for a period of one day or more, and in connection therewith, but not as a limitation thereon, to regulate and provide for supervision of desk clerks in such buildings or structures."

Coupled with the above Section, Section 11-30-3 provides for the licensing, location and regulation of the use and construction of rooming houses with the maximum fee for any license authorized of twenty-five dollars a year. The definition of a rooming house in the Statutes excludes hotels. The definition in Section 137.1-1 embraces hotels and lodging and rooming houses for the purpose of that chapter in the Municipal Code. The minimum number of sleeping rooms named in the Code is 10, and the minimum number of these rooms for a hotel under the Statute is 20. There are very few, if any, hotels that have less than 20 rooms.

It is our opinion that the provisions in Chapter 137.1 constitutes a valid exercise of the police power, fully authorized under the Statutes.

AUTHORITY FOR DEMOLITION

(Commissioner of Buildings—L. A. W.—May 14, 1962)

Reference is made to your recent inquiry as to whether it is necessary to prove 50% depreciation of a boarded up or abandoned building before instituting demolition proceedings.

We reviewed all ordinances and statutes pertaining to this question and found that there are two sections of the Illinois Statutes dealing with this subject. These provisions are found in the Illinois Revised Statutes (1961 Edition) in Chapter 24 under Section 23-70.2 and Section 11-8.3, providing as follows:

"23-70.2 Demolition, repair, of dangerous and unsafe buildings—Lien.) To demolish, repair or cause the demolition or repair of dangerous and unsafe buildings or uncompleted and abandoned buildings. The corporate authorities shall apply to the Circuit Court of the County in which such building is located for an order authorizing such action to be taken with respect to any such building if the owner or owners thereof, after at least 15 days' written notice so to do, shall have failed to put such building in a safe condition or to demolish it. Where, upon diligent search, the identity or whereabouts of the owner or owners of any such building shall not be ascertainable, notice mailed to the person or persons in whose name such real estate was last assessed shall constitute sufficient notice under this section. The hearing upon such application to the Circuit Court shall be expedited by the Court and shall be given precedence over all other suits. The cost of such demolition, or repair shall be recoverable from the owner or owners of such real estate and shall be a lien thereon, which lien shall be superior to all prior existing liens and encumbrances, except taxes: provided that, within 60 days after said cost and expense is incurred the municipality, or person performing the service by authority of the municipality in his or its own name, shall file notice of lien in the office of the Recorder of Deeds in the county in which said real estate is located or in the office of the Registrar of Titles of such county if the real estate affected is registered under the Torrens system. The notice shall consist of a sworn statement setting out (1) a description of the real estate sufficient for identification thereof, (2) the amount of money representing the cost and expense incurred or payable for the service, and (3) the date or dates when said cost and expense was incurred by the municipality. Upon payment of said cost and expense by the owner of or persons interested in said property after notice of lien has been filed, the lien shall be released by the municipality or person in whose names the lien has been filed and said release may be filed of record as in the case of filing notice of lien. The lien may be enforced by proceedings to foreclose as in case of mortgages or mechanics' liens. Suit to foreclose this lien shall be commenced within three years after the date of filing notice of lien. As amended by act approved Aug. 1, 1961."

"11-8.3. Fire limits—Defective buildings.) For the purpose of guarding against the calamities of fire, the corporate authorities of the municipality may prescribe the limits within which wooden buildings shall not be erected, placed, or repaired, without permission, and, whenever buildings within the fire limits have deteriorated or have been damaged by any means to the extent of 50% of their value, may direct that such buildings shall be torn down or removed, and to prescribe the manner of ascertaining whether the specified damage has occurred."

There is also a provision in Article 6 of the Comprehensive Zoning Ordinance of the City of Chicago providing as follows:

"6.4.4. Restoration of Damaged Non-Conforming Building. A building or structure, all or substantially all of which is designed or intended for a use which is not permitted in the district in which it is located, and which is destroyed or damaged by fire or other casualty or act of God to the extent that the cost of restoration to the condition in which it was before the occurrence shall exceed 50 per cent of the cost of restoration of the entire building new, shall not be restored unless said building or structure and the use thereof shall conform to all the regulations of the district in which it is located."

The only provision in the Building Code dealing with percentage of depreciation is found in Chapter 78, reading as follows:

"78-8.5. Alterations and Repairs—More than 50%. When the combined total cost of alterations or repairs within any period of thirty months exceeds fifty per cent of the reproduction cost of a building or structure, such building or structure shall be made to conform to all requirements of this code applicable to new buildings or structures."

Inasmuch as there appears to be no restrictions in the Municipal Code on percentage of depreciation on boarded up or abandoned buildings prior to instituting suits for demolition, we are limited to the provisions of the State Statutes.

The leading Illinois case dealing with this subject is the case of *"City of Chicago v. Mulligan Enterprises, Inc.,"* Ill. App. 2d 481 (1960). In this case the Appellate Court of Illinois was confronted with suit involving a four-story building damaged by fire, and left unoccupied in a dilapidated condition for several years. The City filed a suit for demolition relying on Sections 23-70.2 and 23-71 of Chapter 24 of the Illinois Revised Statute. The lower court granted the City a Decree for Demolition. The defendants appealed first to the Illinois Supreme Court, and later to the Illinois Appellate Court.

In reviewing the action of the lower court, the Appellate Court decided in favor of the City of Chicago, even though the City failed to prove the exact percentage of depreciation. The Court at page 490 said as follows:

"There was testimony that the copings were in dangerous condition: that people might get into the building and fall through holes in the floor; that the shell of the building had loose bricks which could fall and kill someone. Seven photographs were introduced showing the dilapidated condition of the building. On this evidence the chancellor found that the building was dangerous and in unsafe condition. That finding is amply supported by the evidence. Indeed, defendants do not specifically challenge it. *Their one point on that phase of the case is that value was not shown, as required by Section 23-71.* That section empowers the city to order a building torn down or removed when it is damaged to the extent of fifty per cent of its value. The court heard testimony that the building was deteriorated more than sixty per cent. There was testimony to the contrary, but the decree must stand unless it is against the manifest weight of the evidence. Defendants say there

was no proof of original and present value. The conclusions of witnesses were based on physical aspects of the building. They explained their findings by detailing the items destroyed or in bad condition as against those remaining and in good condition. *It appears to us that this issue is relevant only insofar as Section 23-71 offers additional support for legislative intention as to the city's power to take action with respect to this building.*"

Accordingly, it is our opinion that the City may institute suits for demolition of any boarded up or abandoned building, even though the percentage of depreciation is less than 50 per cent, provided the building is in a dangerous or hazardous condition within the meaning of Section 23-70.2 of the Illinois Revised Statute. This is especially true if it can be demonstrated to the chancellor that the condition of such a building may result in injury to life, limb or health, and thus be considered a public nuisance.

"FLOOR RATIO" DEFINED

(Zoning Board of Appeals—E. W. P.—May 14, 1962)

We have your letter dated April 18, 1962, in which you advise that you have an application and had a public hearing on the building of a structure to be known as the Brunswick building, covering the property at 53-69 West Washington Street, Chicago, Illinois. You state further that the application for a building permit was refused by the Zoning Administrator, who held that the erection of a 35-story office building containing, according to the Zoning Administrator's figures, 581,544 square feet of floor area with no off-street parking would be a violation of Article 8.11-6 of the 1957 comprehensive amendment to the Chicago Zoning Ordinance.

You advise further in your letter that Skidmore, Owings & Merrill, Architects for the building, contend that because of the provision in the 1957 zoning amendment relating to the computation of floor area for the purpose of determining the number of parking spaces needed, certain deductions are allowed from the gross floor area. These deductions comprise those areas in the various floors which are not occupiable, nor rentable and which, therefore, engender no vehicular traffic of any nature. Your letter states that the ordinance provides that the first 280,000 square feet of floor area are to be ignored but that the second 280,000 square feet shall require one parking space per 10,000 square feet and that additional floor area shall be computed to the extent of the next 280,000 square feet so as to require one parking space for each 5,000 square feet, and for all additional floor area one parking space shall be provided for each 2,500 square feet.

You advise that the ordinance further provides that where using this method of computation, if the quotient is fewer than 50 parking spaces, none shall be required. You ask our opinion as to whether the deductions as outlined are valid and the result of the computation realistic. You call our consideration to the over-all problem on traffic based on a survey made by the Department of Street Traffic which indicates that 26,681 pedestrians use the walk on the south side of Washington Street, between Clark and Dearborn Streets, between the hours of 7 A.M. and 7 P.M. and that it was felt that when more than 14,000 pedestrians so used a sidewalk, that the curb should not be broken for a driveway.

Section 8.11-6 (1), which refers to parking spaces in the subject district, provides:

"Permitted Uses. Parking spaces shall not be required for any floor area which is not more than two times the lot area in square feet or 280,000 square feet, whichever is greater. For the next 280,000 square

feet of floor area in excess of this exemption, one parking space shall be provided for each 10,000 square feet. For the next 280,000 square feet of floor area, one parking space shall be provided for each 5,000 square feet. For all additional floor area, one parking space shall be provided for each 2,500 square feet."

Section 3.2 in defining floor area provides in part as follows:

"... 'floor area' for purposes of measurement for off-street parking spaces shall not include: floor area devoted primarily to storage purposes (except as otherwise noted herein; floor area devoted to off-street parking or loading facilities, including aisles, ramps, and maneuvering space; or basement floor area other than area devoted to retailing activities, to the production or processing of goods, or to business or professional offices."

Section 8.11, paragraph (1), provides:

"... When the application of these regulations would result in a requirement of not more than 50 parking spaces on a lot in a B6-6, B6-7, B7-6 or B7-7 District, such parking spaces need not be provided."

It is our opinion, based on the computations as determined for floor area and the pertinent regulations governing this situation, that the deductions as outlined and the ensuing result that no parking spaces are required are valid and that recommendation should be made for issuance of the permit for this building, without the requirement of parking spaces.

STORAGE OF EXPLOSIVE HAZARD GAS

*(Division Marshal in Charge, Bureau of Fire Prevention—E. W. P.—
May 29, 1962)*

We have had several conferences with reference to the proposed plan for proper construction of facilities for the storage of ten one-ton cylinders of liquid Chlorine gas, which originated with correspondence of December 28, 1961, and meetings with the late Robert J. O'Brien, former Division Marshal, followed by our meetings with your office, sometimes with the officials of the Applicant, Apex Smelting Company of 2537 West Taylor Street, Chicago, Illinois.

The original request for an opinion had incorporated with it the following questions:

(A) Is it permissible to store over 2,500 cubic feet of a fume or explosion hazard gas in a fume or explosion hazard room?

(B) If over 2,500 cubic feet of fume or explosion hazard gas can be stored in a fume or explosion hazard room, can the amount be limited?

(C) Is it permissible to store less than 2,500 cubic feet of fume or explosion hazard gas without providing a special room or building for such storage?

(D) Can an unlimited amount of fume or explosion hazard gas be stored in a fume or explosion hazard building where the gas is used for purposes other than the manufacture or storage of a fume or explosion hazard gas for resale?

(E) Is a safety clearance required, under Section 60-13 of the Code, for a building housing over 2,500 cubic feet of a fume or explosion hazard gas when the building is used for purposes other than the manufacture or storage of a fume or explosion hazard gas for resale?

(F) Can large cylinders or tanks of fume or explosion hazard gas be stored in the open without complying with the ordinances regulating fume or explosion hazard buildings, fume or explosion hazard rooms and clearance requirements?

Analysis of the various sections of the Municipal Code required a negative answer to these six questions.

However, subsequently, the officials of Apex led to a submission of another plan proposed as a result of our conferences and the recommendations of technicians of four producers and suppliers of Chlorine engaged by Apex to look over the scope and layout of a contemplated installation based on revisions in the contemplated Chlorine storage room projects of March 21, 1962, and various alterations to key buildings in the project, also based on the codes established by the Chlorine Institute, Inc. and the Manufacturing Chemists' Association, Inc. as the minimum. The Fire Prevention Bureau had also recommended that Apex obtain the guidance of Bulletin No. 49 from the National Fire Protection Association and the aforesaid code of the Manufacturing Chemists' Association entitled "Chlorine."

Attached to the data furnished by Apex is its own letter of April 30, 1962, and a letter from Illinois Inspection and Rating Bureau dealing with property insurance, and a communication from Rollins Burdick Hunter Co., Insurance, together with a detailed proposed Chlorine Installation, the Chlorine Manual issued by Pennsalt Chemicals, and a pamphlet on Chemical Safety Data Sheet SD-80 containing Properties and Essential Information for Safe Handling and Use of Chlorine adopted 1960 and issued by Manufacturing Chemists' Association, Inc., of Washington, D. C.

Section 129-68 of the Municipal Code of Chicago provides:

"The sale, storage, use or handling of chlorine gas is hereby prohibited within the limits of the city unless chlorine gas is stored in buildings constructed and maintained in accordance with the building provisions of this code in containers constructed in compliance with the interstate commerce commission rules and regulations.

"No combustible material of any kind shall be placed or kept in any room, or building, used for the storage of chlorine gas."

Compliance with the Interstate Commerce Commission rules and regulations in the construction of containers for Chlorine, a prerequisite, we assume, has been obtained by Apex. In addition to this precaution, the known standard, nationally, should in our opinion be consulted as in the case of anesthetics and other substances.

Chlorine is a toxic which is defined in Chapter 111½ of Illinois Revised Statutes (1961), Section 252-5, as any substance other than radioactive substance which has the inherent capacity to produce bodily injury or illness to man through ingestion, inhalation, or absorption through any body surface. The Northeastern Illinois Metropolitan Area Air Pollution Control Board, created by the Legislature in 1961, is organized to assist and cooperate with municipalities, as well as others, in the control of any air pollution and this Chlorine substance as well as others is a kindred subject of this Chapter.

It is our further opinion that the Municipal Code should govern whenever applicable for the installation and maintenance of the subject operation in the use of Chlorine. The Apex Smelting Company contemplate the use of Chlorine for the manufacture of aluminum ingots which they propose to sell to others for the manufacture of aluminum castings. Apex advises competitors are located and using Chlorine in large cities across the country, including New York, Philadelphia, Cleveland, Aurora, Kansas City, Los Angeles, etc.

It is our considered opinion that with the proper safeguards and extraordinary precautions in accordance with the regulations and codes to which Apex commits themselves to be governed that the operation should be approved.

CLASSIFICATION OF GARAGE

(Administrative Assistant, Department of Buildings—E. W. P.—June 19, 1962)

We have your letter dated June 5, 1962, in which you enclose Driveway application for a Service Station of the Firestone Company located in the shopping center within the Lake Meadows development on the near South Side of Chicago. You state that there are two questions involved in the granting or withholding permission to build at this site.

Your first inquiry as to whether or not the service station constitutes a garage or a motor vehicle repair shop (no flammable tanks will be installed) under the provisions of Chapter 40 of the Municipal Code, and the application describes the use of the premises as a Firestone Service Store and Shopping Center Parking Areas. The area described we assume to be an open area used for the parking of passenger automobiles for customers and employees. This does not fall within the definitions of a garage in the Code.

Section 156-13 describes a public garage as follows:

"The term 'public garage' as used in this chapter is hereby defined as meaning any building, structure, premises, enclosure, or other place, except a public way, within the city, where two or more motor vehicles are stored, housed, or parked for hire, in a condition ready for use, or where rent or compensation is paid to the owner, manager or lessee of the premises for the housing, storing, sheltering, keeping, or maintaining of such motor vehicles. Provided, that nothing in this section shall be construed as applying to off-street parking of passenger vehicles with seating capacity of not more than seven passengers on vacant property maintained for the accommodation of patrons or employees of business establishments or occupants of residential units, where such parking is permitted without supervision by paid attendants."

It is therefore our opinion that the proposed use, if it is an open area for parking, does not constitute a garage. The service store we understand to be a retail store for the purpose of sale or accommodation for tires and this would not constitute a vehicle repair shop. It is our further opinion that neither one of these proposed uses comes within the provisions of Section 40-9, which Section makes it unlawful to locate or construct a garage within 200 feet of any building used as and for a hospital, church or public or parochial school in answer to your second inquiry pertaining thereto.

It is therefore our opinion, if the information that we have in this letter is correct, that a permit may issue provided all other ordinances are complied with.

PERMIT FOR FLAMMABLE LIQUID TANK

(Deputy Commissioner, Department of Buildings—E. W. P.—July 18, 1962)

We have your letter dated June 13, 1962, in which you advise that an application for a permit to install one 80,000 gallon above-ground tank has been submitted to your Department for approval. You advise that Section 60-2 of the Municipal Code describes Class IV Liquids as any liquid having a flash point in excess of one hundred eighty-seven degrees Fahrenheit or eighty-six degrees Centigrade and you state that under this interpretation vegetable oil would be placed in Class IV Liquids.

You further advise that Section 60-10 of the Safety Clearance provisions of the Code is not adhered to because the proposed location of the oil tank is less than the required safety clearance of two hundred fifty feet.

You advise also that Sanborn Map Volume 5, page 56, shows there are one hundred thirty-nine above-ground tanks of various capacities, and that Section 60-52 limits the capacity of a storage yard to 1,500,000 gallons for Class IV Liquids, and requires all above-ground tanks to be diked. The tanks located at this storage yard, you state, are apparently in excess of the permitted gallonage and, therefore, should not be approved if the definition of Class IV Liquids is adhered to.

The question is whether or not vegetable oil falls within the classification of flammable liquids, Class IV. Vegetable oil, as the name indicates, is obtained from vegetables and is generally used for cooking purposes and as an ingredient of preparation of foods. An example of a Class IV flammable liquid under the Code is petroleum, which cannot be considered in the same class as vegetable oil. The listing of the National Fire Protection Association of vegetable oil at six hundred ten degrees flash point shows that it is far removed by degrees from what is generally considered flammable liquid.

It is our opinion that the application may be processed and the permit issued for the 80,000 gallon above-ground tank provided that all precautions are taken, and provided further that the Applicant will furnish an affidavit that no other liquid shall be installed in the tank.

AIR CONDITIONING UNITS

(Assistant Zoning Administrator—E. W. P.—July 27, 1962)

We have your letter dated June 5, 1962, in which you enclosed copy of letter from James J. McKeague, Chief Inspector of the Department for the Inspection of Steam Boilers, Unfired Pressure Vessels and Cooling Plants. Mr. McKeague advises that a number of contractors and owners are installing refrigeration equipment used in connection with air conditioning in the space located between the building line and the lot line.

He states that the condensing part of the system is located in the above space and connected by means of water piping, refrigerant piping, and electrical conduit to the cooling portion of the system located in the building and in the duct work of the heating plant. Mr. McKeague states further that the portion of the equipment located outside of the building, in many cases, is noisy and dispels heat onto and into the neighbor's homes, resulting in many complaints and neighbor controversies. Mr. McKeague wishes to know whether or not the Zoning Ordinance is being violated by these installations.

Section 5.7-5 pertaining to permitted obstructions in required yards lists the following exemptions:

"(1) In All Yards—open terraces not over four feet above the average level of the adjoining ground but not including a permanently roofed-over terrace or porch; awnings and canopies; steps four feet or less above grade which are necessary for access to a permitted building or for access to a zoning lot from a street or alley; chimneys projecting 18 inches or less into the yard; recreational and laundry-drying equipment; arbors and trellises; flag poles; fences and walls not exceeding five feet in height above natural grade level; and open type fences exceeding five feet in height, provided that visibility at right angles to any surface of such fence not be reduced by more than 20 per cent.

(2) In Front Yards—one-story bay windows projecting three feet or less into the yard; and overhanging eaves and gutters projecting three feet or less into the yard.

(3) In Rear Yards—enclosed, attached or detached off-street parking spaces; open off-street parking spaces; accessory sheds, tool rooms, and similar buildings or structures for domestic or agricultural storage; balconies; breezeways and open porches; one-story bay windows projecting three feet or less into the yard; and overhanging eaves and gutters projecting three feet or less into the yard.

(4) In Side Yards—overhanging eaves and gutters projecting 18 inches or less into the yard."

It is to be noticed that the permitted obstructions include awnings and canopies; flag poles; detached off-street parking spaces which also are not part of the building. This refrigeration equipment, the subject of Mr. McKeague's letter, is connected by means of piping and conduit to the cooling portion of the system located in the building and it is our opinion that these refrigerators are obstructions which are not permitted in required yards.

MOTOR FREIGHT TERMINAL

(Assistant Zoning Administrator—E. W. P.—August 15, 1962)

We have your letter dated August 2, 1962 in which you attach photostatic copies of letters from the Geo. McNeil Teaming Co., cartage contractors now located at Ohio and Franklin Streets, Chicago, Illinois. The Company contemplates the purchase of properties located between Walnut and Fulton Streets on the east side of N. Oakley Blvd. The Company proposes to build a garage on the Fulton Street frontage for warehousing and distribution uses of paper and the storage of their trucks, and on the Walnut Street frontage to construct a building for their office use. The area of the property on Fulton Street is approximately 36,000 square feet, and on Walnut Street about 21,000 square feet.

The correspondence transmitted indicates that the Company is in the local cartage business, operating trucks from 1½ ton to 5 ton capacity entirely within the confines of the City of Chicago and adjacent suburbs. Their business deals entirely with paper which is consigned to them by Railroad Piggy-Back and highway truckloads from various paper mills. These trucks would be unloaded in the garage and never from the street. The paper is then assembled and consigned by trucks leased to Paper Jobbers and to Mail Order Houses for deliveries to various Mail Terminals and Main Post Office.

You request our opinion as to whether or not the zoning, M2-4, is adequate for this operation. The main question to be determined is whether this operation constitutes a Motor Freight Terminal, solely, which use under the Zoning Ordinance is confined to a C-4 Zoning District. The preamble in Section 9 describing a C-4 Motor Freight Terminal District reads as follows:

"The C4 Motor Freight Terminal District is designed to accommodate large-scale trucking terminal operations involving *inter-state and intrastate* motor carriers, which activities are *incompatible* with the great majority of other land uses and so are most suitably placed in a special zoning district mapped in *strategic locations* for efficient coordination with the city's planned street and thoroughfare system." (Italics supplied.)

Motor Freight Terminal Districts are very limited in scope and in map locations, involve both inter-state and intrastate motor carriers and so placed as to be in strategic locations for efficient coordination with the City's planned street and thoroughfare systems. This particular operation could, in our opin-

ion, be located in a C-4 District, but can also be located in an M-2 or M-3 District provided that it meets with the Performance Standards governing the M-2 or M-3 uses. A garage of the magnitude contemplated is permitted in an M-2 District and the warehousing and distribution of paper products is permitted within fully enclosed buildings or structures having incombustible (non-frame) exterior walls.

In the Guide to the location of industries in manufacturing districts contained in the Appendix concerning paper pulp, paper board containers and similar products, these activities are indicated as permitted in the M-2 Districts. You will note Footnotes 2 and 5 of the Appendix. The decision as to whether or not the proposed garage building should be protected throughout by an automatic sprinkler system because it involves a product of paper pulp would have to be made by your Department and the Fire Prevention Bureau.

We are advised that there are other uses in this area that have been sold by Land Clearance for large scale garage use. We are also advised that the Land Clearance has recently sold the adjacent property to the present site to the Gilbert Carrier Co., who distribute womens garments, consigned to it by truck, to their customers in Chicago by truck operation.

Our zoning investigator, Arthur Kvale, investigated the present location of the Company and also the subject site, and his report confirms the physical use as well as the operation.

It is, therefore, our opinion that the proposed use is permitted in the M-2-4 Zoning District, provided that it meets the Performance Standards as set forth in the ordinance and provided further that it complies with all other pertinent ordinances.

"FREE" PERMITS

(Acting Commissioner of Buildings—W. M. Z.—December 14, 1962)

Please refer to your communication of December 11, 1962 whereas you stated as follows:

"On Wednesday, June 24, 1959, an ordinance was passed by the City Council authorizing free permits for '... the University of Chicago, hospital, school buildings, and other necessary buildings and fuel storage facilities connected with the University of Chicago ...'. This ordinance may be found on Page 501 of the Council Journal."

"Recently we have been receiving applications for 'free permits' from electrical contractors who are rewiring apartment buildings which are owned by the University of Chicago. The occupants of these buildings have in most cases no connection with the University whatsoever, except the relationship between tenant and landlord."

"(1) Shall we issue 'free permits' for this work?"

"(2) When does a structure regardless of use become a 'necessary building' within the intent of this ordinance?"

"We respectfully request your opinion on these two questions as it appears the University of Chicago is going to continue to acquire much residential property in this area, most of which is in poor shape electrically. In every instance so far the tenant has continued to pay rent, gas and electricity as any other apartment dweller does at approximately the same rate of rent being collected in similar apartments in that area being run for profit."

May we call to your attention the second paragraph of the ordinance which reads in part as follows :

"Said buildings and all appurtenances thereto shall be used exclusively for charitable and educational purposes and shall not be leased or otherwise used with a view to profit, * * *."

1. It is our opinion that "free permits" should not be issued in rewiring of apartment buildings not directly connected with the University's Buildings proper.

2. It appears that a "necessary building" is one used exclusively for charitable and educational purposes and no other. It is therefore our opinion that apartment buildings do not fall in that category.

DEMOLITION OF NUISANCE

(*Alderman, 19th Ward—E. W. P.—January 28, 1963*)

With reference to your oral request of even date for an opinion as to whether or not structures of billboards and signs unlawfully located may be summarily torn down by the Municipal authorities and lien charged against the property for the cost of demolition, there have been several opinions on authority to demolish buildings and structures which we believe control the situation.

On page 433 of Volume 24 we wrote as follows :

" . . . To obviate any question of the validity of the Council's definition or declaration of a nuisance, and to avoid the possible assertion of liability against the City and its officials, it would seem advisable, in cases other than those involving emergency situations created by buildings which have suddenly become so imminently dangerous to public health or safety as to require their immediate demolition, that resort should be had to a court of equity in order to accomplish the abatement of the nuisance by the razing of the structures."

On page 386 of Volume 22 of the Opinions we said :

"The City is empowered to define, prevent and abate a nuisance but the building or structure must be imminently dangerous to the public health, safety and welfare and a nuisance in fact."

In the case of *Nazworthy v. City of Sullivan*, 55 Ill. App. at page 48, the Court said :

"Where nuisances consist of the use of a structure, the law will not justify its destruction. The cause of the offense is alone to be removed."

If the City declares property to be a nuisance and destroys it, when, in fact, it is not a nuisance, the City is liable for the damages sustained by the owner. *Sings v. The City of Joliet*, 237 Ill. App. at page 300. And it has been held that officers seeking to justify their acts by authority of the City can do so only to the extent that the City might do so. *McQuillin on Municipal Corporations*, Volume 2, page 374.

It is our opinion that the orderly procedure should be followed, except in grave emergencies, and that action should be taken through the Courts either by fines for every day penalties or by an order for demolition.

ENFORCEMENT OF CODE AGAINST PRE-EXISTING NON-CONFORMING USES

(Acting Commissioner of Buildings—E. W. P.—July 3, 1963)

We acknowledge receipt of your letter of July 2, 1963, in which you advise that you have inspected quite a number of single family residences under the survey type of inspection in Hyde Park-Kenwood, and these inspections indicate many of the structures to be single family dwellings, original construction, wherein only one stairway was provided to the third floor occupancy. Under the code at the time these structures were built, this was permissible. Most of these buildings were erected prior to the first World's Fair or between 1890 and 1910. Many of them are of row-house type occupancy with party walls between the buildings; some of them are on lots twenty feet (20') or less in width.

These buildings complied with all of the applicable provisions of the code at the time they were built and have never been converted.

You request an opinion as to whether or not you should enforce the provisions of Chapter 78 and Chapter 67 (the present code) for additional means of exit from the upper floors. You state that in many instances this would prove an undue hardship to the occupants of these structures. It cannot be said that a hazardous condition could exist in a single family dwelling where the present situation has existed for these long periods of time. Furthermore, we have ascertained that it would be necessary to eliminate much of the livability of these narrow structures if an additional stairway was provided. It is our opinion that under all of these facts, the owners of the buildings have a right to the existing use, although it might be non-conforming. (*Brown v. Gerhardt*, 5 Ill. 2d 106.)

CLASSIFICATION AS SCHOOL THROUGH USE

(Acting Commissioner of Buildings—E. W. P.—October 24, 1963)

We have your letter dated October 7, 1963, with reference to the above-captioned subject. You request our opinion as to the following points:

Is it permissible to have ten (10) classes of children in this building for religious instruction only?

Should this building be classified as a school due to the large number of children in attendance?

Under date of October 3, 1962, an opinion was rendered from our office addressed to Honorable Francis J. Murphy, Division Marshal in Charge of Bureau of Fire Prevention, copy of which is attached hereto, which covers the points that you ask with reference to our opinion as to the applicability of Section 64-1.2 of the Municipal Code relating to fire prevention and particularly with reference to the requirement of the installation of sprinkler systems at school buildings.

The report on the subject building of your inquiry from your Chief of Inspections, attached to your correspondence, reads as follows:

"This is a 3 and 4 story building of ordinary construction, 120' x 150' constructed in 1907. Original use was a Masonic Temple. The healing temple was established in 1961 at this location. At present this

building is being used for religious purposes. Children attend classes in this building for religious instruction only. The ages of these children are from 3 to 18 years of age. (From 5:30 p.m. to 7:30 p.m. on Wednesday—350 children; from 12 noon to 2:00 p.m. on Saturday—100 children; and from 2:00 to 4:00 p.m. on Saturday—200 to 300 children attend.)

Occupancy of the various floors as follows:

4th floor—has three (3) classrooms and one (1) apartment. Approximately 150 to 250 children are on this floor at one time.

3rd floor—has four (4) classrooms and one (1) assembly hall.

2nd floor—contains a lunch room and two (2) lounges.

1st floor—contains the main church and the junior church offices.

The boiler room is in the basement.

Partition construction is of hollow tile plaster and masonry. There are two (2) stairs, grade to 4th floor; one (1) stair, grade to 3rd floor; one (1) stair, grade to 2nd floor. There are two (2) fire escapes on this building. Stairwells are not enclosed. The stairwells are of noncombustible material. Access to the two (2) fire escapes is through a 1¼" solid core wood door with panic hardware.

Building does *not* contain a complete system of automatic sprinklers.

Attached are copies of notices indicating the violations within the building."

It is our opinion that the building should be classified as a school. You did not attach the list of the violations within the building and, of course, all of these must be met, and should the building meet all other requirements it is our opinion that a complete system of automatic sprinklers is also required.

WITHHOLDING PERMITS

(Acting Commissioner of Buildings—R. J. E.—November 22, 1963)

Your letter of November 12, 1963 requests an opinion as to whether or not the Department of Buildings can withhold the issuance of a building permit for the construction of a six-story and basement office building at the above address.

You state that a review of the application and the plans indicated the proposed building be in full compliance with the applicable provisions of the zoning and building code requirements for this type of use.

You also enclose a copy of a letter from the Alderman of the 39th Ward requesting that you hold all applications for building at 5901 N. Cicero, Chicago, pending proposed zoning in that "many residents and associations are opposed to the six-story high-rise office building in a strictly residential community."

In *Phillips Petroleum Co. v. City of Park Ridge*, 16 Ill. App. 2d 555, a similar situation had arisen. In that case, the Phillips Petroleum Company made application to the Building Department of the City of Park Ridge for a building permit. At the time the application for a permit was filed, the area was classified under an existing zoning ordinance of that municipality that permitted the use applicant sought. Subsequently, the city council passed a resolution to review and study the zoning within the city and during this investigation ordered the Building Department to refuse to issue any building permits for gasoline service stations. The plaintiff contended that the city

council of Park Ridge had no power to suspend the operation of the existing zoning ordinance by resolution pending a review of zoning within the municipality. The court held that the defendant, the City of Park Ridge, had no right to withhold the issuance of a permit and that the rights of the parties crystallized at the time when the permit was applied for and was improperly withheld. The court further stated that to hold otherwise would be to give the city, without statutory authority, a right to suspend a zoning ordinance.

The case of *Chicago Title and Trust Co. v. Palatine*, 22 Ill. App. 2d 264, where the court therein held that a building permit could be withheld pending a comprehensive zoning amendment, is distinguishable from the facts that are presented to us herein. In the *Palatine* case, a comprehensive amendment was being studied prior to the application for a permit, whereas in the facts relating to the subject property there is merely a possibility that there may be a change in zoning, said possibility arising subsequent to the application for permit.

It is, therefore, our opinion that the Department of Buildings cannot withhold the issuance of the building permit for an unreasonable length of time pending the possibility of a zoning amendment.

DEFINITION OF ELECTRICAL EQUIPMENT

(Chief of the Bureau of Electrical Inspection—M. M. M.—June 25, 1964)

Your letter of June 12, 1964 to John C. Melaniphy, Corporation Counsel, has been referred to the writer for reply.

Attached to your letter of June 12, 1964, was an inquiry from Mr. Wm. B. McClurg, Railway Express Agency, Inc. as to whether installation of electrical equipment on the captioned property be subject to inspection under provisions of the Municipal Code of Chicago (Chapter 86-10 General Provisions) which provides as follows:

"The term 'Electrical equipment' as used in the electrical regulations of this code is hereby defined as meaning conductors and equipment installed for the utilization of electricity supplied for light, heat or power, and signal light, heat, or power, not including radio apparatus or equipment for wireless reception of sounds and signals and does not include apparatus, conductors, and other equipment installed for or by public utilities, including common carriers, which are under the jurisdiction of the Illinois Commerce Commission, for use in their operation as public utilities."

The letter from Mr. Wm. B. McClurg further advises that the Railway Express Agency Inc. is a common carrier. (Ill. Public Utilities Act Chap. 111½, Section 10.4) under the jurisdiction of the Illinois Commerce Commission.

The Railway Express Company Inc. has leased from the Chicago Burlington & Quincy Railroad the captioned property for use as a terminal in the conduct of express transportation business. The Railway Express Agency is presently arranging for installation of various electrical equipment in and upon said property.

The issue whether the Public Utilities Act (Chap. 111½ Ill. Revised Statutes) gives the Commerce Commission exclusive control over all property of the utilities has been decided by the Supreme Court of Illinois in the *City of Chicago v. Alton Railway Company*, 355 Ill. 65 (1933). This was the action by the City of Chicago to recover from the Alton Railroad Company fees for inspection of three buildings of the railroad in Chicago and for inspection of

passenger and freight elevators therein. The Court, in its decision, found that the legislature did not intend by the Utilities Act, to give to the Commission exclusive control over all of the property owned by the public utilities. The Court also ruled that Cities and Villages may exercise police power over such property as has no definite public utility feature or use, where this control will not tend to defeat the object of the Public Utilities Act.

In finding for the City that the inspection and fees were justifiable, the court ruled that buildings owned by public utilities and used by it for general office use, for storing records and for handling freight or leased by it to tenants for other purposes, are subject to the Building Code of the City of Chicago with respect to regulation and inspection and the City Authority in regard thereto is not superseded or repealed by the Public Utility Act where the uses of the property in question are not such as are contemplated by the legislature in the provisions of said Act for control and regulation. The *City of Chicago v. Alton Railroad Company* was cited and reaffirmed in the *City of Chicago v. Hastings Express Company, et al.*, 369 Ill. 610 (1933).

Referring to the Municipal Code of Chicago, Chapter 86-10 General Provisions) previously cited, the term "Electrical Equipment" would exclude only "... apparatus, conductors and other equipment installed for or by public utilities including common carriers which are under jurisdiction of the Illinois Commerce Commission for use in their operation as public utilities. This exclusion in the Ordinance would then only apply to such electrical equipment which was distinctively a public utility feature or use and under the supervision of the Illinois Commerce Commission. The exclusion was inserted so as to conform with the powers granted to Cities and Villages for the inspection of electrical equipment under Section 11-37-1 Chapter 24 Ill. Revised Statutes 1963.

We are therefore of the opinion that the planned installation of electrical equipment in and upon captioned property will be subject to the inspection provisions of the Municipal Code of Chicago and will require a permit.

MOTOR FREIGHT TERMINAL DEFINED

(Acting Commissioner of Buildings—E. W. P.—November 2, 1964)

We have your letter of October 30, 1964 in which you enclose photostatic copies of application for permit, house number certificate, copies of correspondence including police stop order, etc., concerning the above subject premises.

The application, plans and survey submitted to your office July 20, 1964 indicate the erection of a one and two story warehouse and office building. The permit was issued to erect this structure for the indicated type of occupancy on August 5, 1964.

You further advise that thereafter a complaint was filed by a community group and several taxpayers indicating that the structure as planned was to be a motor freight terminal, and again on October 21, 1964, a further complaint was made also indicating that the structure was under construction but being partially used as a motor freight terminal. Hon. John Maloney, Zoning Administrator, visited the premises and indicated to you that the construction had progressed to the roof line and that there was a strong possibility that the structure when completed could be used as a motor freight terminal. You then requested the Superintendent of Police to stop the work and to keep the work stopped until further notice from your department.

About three days afterwards, the owner of the subject premises appeared in your office together with the Builder and stated that the building

was being built on a site owned by the New York Central Railroad, and that on the west side of the building there is a spur track of the New York Central Railroad serving this building. The applicant further stated that the building will be used to warehouse certain commodities for periods from one month to six months duration and suggested that this occupancy could not be construed as a motor freight terminal type occupancy. His lawyer also sent a letter to your office indicating the type of occupancy that the building was being constructed for.

The lawyer, Mr. John P. Murray, wrote on October 28 advising that the property on which the building was to be built is owned by the New York Central Railroad, and that there is a spur track on the west side of the building of the New York Central which is to serve the use contemplated. He advises that the doors of the building are about 50 feet apart to handle railroad cars and also "piggy-back" trailers on New York Central Railroad cars. He advises further that the merchandise will be stored for an average period of one to six months at the building and then shipped by local trucks to customers.

The definition of a motor freight terminal as set forth in the Chicago Zoning Ordinance, as amended to 1964, provides as follows:

"Motor Freight Terminal. A 'motor freight terminal' is a building or area in which freight brought by motor truck is assembled and/or stored for routing in intra-state and interstate shipment by motor truck."

Mr. Murray contends in his letter that since the freight is delivered by rail there cannot be a motor freight terminal and he states that his client contemplates a warehouse where merchandise is held for a period, to be delivered to Zayre Stores and others in the City of Chicago. He further advises that his client does not have a permit from the Federal Interstate Commerce Commission nor from the Illinois Commerce Commission and could not operate the property as a motor terminal or as a motor carrier.

The facts as presented, including the photographs attached to your letter, indicate that the applicant contemplates the warehousing of freight brought by rail either in box cars or "piggy-back" and then it is assembled and/or stored for routing in intrastate shipment by motor truck. Both the C-4 and the M-3 classifications permit railroad and water freight terminals, railroad switching and classification yards and accessory uses, including storage, but only the C-4 classification permits motor freight terminals which according to its definition embraces freight brought by motor truck.

The statement of the applicant, the letter from his attorney, and the other physical facts which you presented indicate that the proposed warehousing, the acceptance of freight by railroad, and the routing fall within the M-3 use and that the motor freight terminal as permitted only in the C-4 District is not intended.

However, to safe-guard the City and the public, it is our opinion that an affidavit should be obtained from the applicant on behalf of himself and the 5J Warehousing Company, their heirs, successors and assigns, that a motor freight terminal is not contemplated on the subject premises and will never at any time in the future be established there. With this affidavit and all other considerations it is our opinion that the permit should be restored and the contemplated structure, according to the plans and specifications, be permitted to proceed.

PUBLIC GARAGE DEFINED

(City Collector—E. W. P.—July 7, 1965)

We acknowledge receipt of your letter of June 28, 1965, in which you enclosed a copy of letter under date of June 18th addressed to you from Baird and Warner, Inc., 1415 Morse Avenue. You ask our opinion as to whether or not the premises at 1519 Morse Avenue, whereon the structure in question is located, requires a Public Garage license. Your license investigator reports that the structure consists of 10 separate places accommodating 10 individually owned vehicles; that each enclosure is separately rented and is completely walled off by the brick partition which reaches from the ceiling to the floor; and that there are 10 doors, one for each enclosure, so that each enclosure is complete with its own private means of ingress and egress.

You wish to have us interpret Section 156-13 of the Municipal Code of Chicago as applied to the premises, which section reads as follows:

"The term 'public garage' as used in this chapter is hereby defined as meaning any building, structure, premises, enclosure, or other place, except a public way, within the city, where two or more motor vehicles are stored, housed, or parked for hire, in a condition ready for use, or where rent or compensation is paid to the owner, manager or lessee of the premises for the housing, storing, sheltering, keeping, or maintaining of such motor vehicles."

Your question specifically in page two of your letter asks whether the described structure should be considered as one unit for the storage of two or more vehicles, or whether each unit as described is a separate space or enclosure under a separate roof, with individual means of ingress or egress and not capable of storing two or more vehicles in each space, would place it out of the purview of Section 156-13 of the Code.

It is our opinion that the owner of the structure operates the business of a Public Garage for hire and that his structure falls within the terms of the definition of a Public Garage in Section 156-13 of the Code. It is true that in Section 47-2 in the definition of "Building" there is the language "When separated by fire walls, each unit so separated shall be deemed a separate building." Even in this instance, if we should consider the partitions and the doors as fire walls, the operation and management comes within one ownership and control, and the definition of "Public Garage" includes *any premises* as well as buildings, structure, enclosure or other place where two or more motor vehicles are stored, housed or parked for hire.

It is our opinion that the operation comes within the purview of Class I, which includes all public garages enclosed within garage buildings under Section 156-17.

FIRE EXTINGUISHERS IN MULTIPLE DWELLINGS

(Division Marshal in Charge, Bureau of Fire Prevention—R. A. P.—September 2, 1965)

In your letter of July 28, 1965, you request an opinion concerning the proper interpretation of Section 64-4.1 (b) of Chapter 64 of the Municipal Code of Chicago, which relates to the requirement of fire extinguishers in multiple dwellings.

Section 64-4.1 provides the general rule as follows: "One standard fire extinguisher shall be provided on every floor, basement and sub-basement of all buildings and structures for each 4,000 square feet of floor area or fraction thereof with the following exceptions."

Section 64-4.1 (b), the second of the seven exceptions to the general rule and the exception in question, provides as follows: "Multiple Dwellings. Fire extinguishers shall not be required in Multiple Dwellings not exceeding three stories in height and having a floor area not exceeding 4,000 square feet."

No significant changes in the wording of this particular provision have been made since 1948. In the absence of any legal decisions regarding the correct interpretation of Section 64-4.1 (b), reference is made to prior legislation dealing with the requirement of fire extinguishers in multiple dwellings in order to determine the legislative intent.

The Municipal Code of Chicago of July 1, 1948, reflects the following wording: "Section 63-9, Standard fire extinguishers as described in Chapter 90 of this Code shall be installed in every multiple dwelling as follows: "One standard fire extinguisher in each basement and each hallway of each floor which has an area greater than 4,000 square feet and not more than 10,000 square feet; two standard fire extinguishers when the area of any such floor exceeds 10,000 square feet; One standard fire extinguisher in each basement and each hallway of each floor *above the third floor* where the area of any such floor is *4,000 square feet or less.*" (Italics supplied.) This particular provision of the Code remained substantially the same from 1939 to 1948.

The present provisions of Section 64-4.1 are obviously an attempt to clarify and elaborate upon the brief requirements set out in the Municipal Code prior to 1949 as Section 63-9.

Interpreting Section 64-4.1 (b) in the light of the older Section 63-9, especially considering the underscored wording, leads one to the conclusion that the framers of Section 64-4.1 (b) intended that at least one fire extinguisher be required on every floor above the third floor of any multiple dwelling even though the floor area of said floor was less than 4,000 square feet. To interpret Section 64-4.1 (b) otherwise would be to simply re-state the general rule of Section 64-4.1 which uses the standard of floor area only. I recommended for your consideration, the amending of Section 64-4.1 (b) to clearly reflect the above interpretation of that section.

REFUND ON CONSTRUCTION PERMIT FEE

(Chairman, Committee on Finance—L. H. G.—December 2, 1965)

The above claim has been referred to us for an opinion as to the rebate to the Claimant for the sum of two items totaling \$1559.45. The items are for permits paid to the City of Chicago, as follows:

Permit fee #367284 in the sum of \$967.35

Permit fee #465828 in the sum of \$592.10

These permits were taken out for constructing the Center for Continuing Education at 1307 E. 60th Street for the University of Chicago School of Social Service Administration Building.

The Journal of the Proceedings of the City Council of the City of Chicago, Page 501, June 24, 1959, shows as enacted an ordinance pertaining to the University of Chicago in the following words:

"Be It Ordained by the City Council of the City of Chicago :

Section 1. The Commissioner of Buildings, the Commissioner of Public Works, the Commissioner of Streets and Electricity, the President of the Board of Health, and the City Collector are directed to issue all necessary permits and licenses, free of charge, notwithstanding other ordinances of the City of Chicago to the contrary, to The University of Chicago, an Illinois corporation not for pecuniary profit, for the erection and maintenance of hospital and school buildings and other necessary buildings and fuel-storage facilities connected with the activities of The University of Chicago, an Illinois corporation not for pecuniary profit, in the area bounded by E. 55th Street on the north, the right of way of the Illinois Central Railroad on the east, E. 61st Street on the south, and S. Cottage Grove Avenue on the west.

"Said buildings and all appurtenances thereto shall be used exclusively for charitable and educational purposes and shall not be leased or otherwise used with a view to profit, and the work thereon shall be done in accordance with all of the appropriate provisions of the Chicago City Code and the departmental requirements of various departments of the City of Chicago, and said buildings and all appurtenances thereto shall be constructed and maintained so that they shall comply in all respects with the requirements of the appropriate provisions of the Chicago City Code for the issuance of all permits and licenses.

"Section 2. This ordinance shall take effect and be in force from and after its passage and due publication."

Said ordinance was passed by 47 affirmative votes and no vote in opposition.

Because of said ordinance, it is our opinion that the sums paid out as fees for the permits above mentioned should be refunded. But inasmuch as the actual payment of the fees for said permits were paid by the Claimant, Hyre Electric Company, we suggest that any voucher in refund should be made payable to the order of the Claimant and The University of Chicago. We are returning your file herewith.

INABILITY TO TURN OVER PROPERTY FOR DEMOLITION

(Department of Public Works—F. O.—January 18, 1966)

Your attached letter of transmittal requests our opinion as to whether or not you may delete the buildings indicated from the above cited demolition contract and release retained percentages to the contractor in view of the inability of the City to make available said buildings for demolition within a period of 180 days following notice, said period being the time within which the contractor is to complete all work.

You advise that the contractor heretofore set a value of \$800.00 for each of the buildings involved, the total value of the work to be deleted amounting to \$3,200.00. You advise, also, that the Bureau of Public Roads will consent to the deletion of this portion of the project, but in any future contract, they will not participate beyond the amount of \$3,200.00 for the work not yet done on this contract. You inform us that the cost of the work remaining to be done will be greater than \$3,200.00.

The issue that you have interpreted to be involved in this matter is whether the inability of the City to make available to the contractor the subject buildings within 180 days following notice to proceed is grounds for terminating the contract and paying retained percentages to the contractor.

Attention is invited to the General Conditions, at page GC-5:

"Anything contained in the Contract Documents to the contrary notwithstanding, it is agreed that the following provisions relative to unavoidable delay shall be controlling:

"1. Should the Contractor be obstructed or delayed in the commencement, prosecution or completion of the work under this contract by any act or delay of the City or by order of the Commissioner, then the time herein fixed for the completion of said work will be extended for a period equivalent to the time lost by reason of such acts or delays of the City or orders of the Commissioner and no time extensions will be granted for any other cause. In determining the amount of the time lost and the equivalent period of extension, the relation of the work affected by such acts or delays of the City or orders of the Commissioner to the total work and progress under the contract will be considered by the Commissioner. The Commissioner will then recommend to the Purchasing Agent the amount of time extension which appears equitable to the Commissioner.

"2. The Purchasing Agent will, after receipt of recommendation from the Commissioner, determine the number of days, if any, that the Contractor has been delayed by any act or delay of the City or orders of the Commissioner. Such determination by the Purchasing Agent, when approved and authorized in writing by the Mayor, Comptroller and the Purchasing Agent, will be final and binding upon other parties to the contract.

"3. It is further expressly understood and agreed that the Contractor shall not be entitled to any damages or compensation from the City, or be reimbursed for any losses, on account of any delay or delays resulting from any of the causes aforesaid."

In view of the foregoing provisions, it is our opinion that the inability of the City to turn over the buildings to the contractor within 180 days does not terminate the contractor's performance obligations thereunder. We are of the opinion that the provisions above cited would be controlling and that appropriate time extensions would be in order to cover the period of delay caused by the City.

We qualify the foregoing opinion with the reservation that if the impossibility of performing this contract was for an unreasonable or considerable period of time, beyond the contemplation of the parties (see paragraph 2, page DS-3), then in such event, it is our opinion that no legal objection would exist to the parties, by mutual consent and subject to the propriety of compensation thereof, concluding the contract by deletion of the buildings involved and releasing to the contractor the retained percentages.

"§ 463. Breach by Impossibility Created by Party.

In like manner, where one party has by his own act made the contract incapable of full performance, the other may treat such act as a discharge from further performance and claim compensation for the part he has performed . . ." (*Lawson on Contracts*, 3rd Edition, Section 463, pg. 606; *City of Chicago v. Tilley*, 103 U. S. 146.)

We shall be pleased to assist further, if our services in connection herewith are required.

Section B. ZONING

VARIATIONS, VESTED RIGHTS IN

(J. C. P.—E. W. P.—January 3, 1961)

We have your letter of December 27, 1960, relative to the proposed use as specified, in which letter you attach copy of agreement for the purchase of the property between the Church and the prior owner, conditioned upon the Church obtaining necessary variation under the 1942 ordinance, the grant of the variance from the Zoning Board of Appeals, Calendar No. 386-57-Z under date of June 18, 1957, the evidence of the consummated purchase of the land for \$20,000.00 by the Church, the pursuant sale by the Church of the property of its prior location at 1655 North Rockwell Street Chicago, Illinois, to the Catholic Bishop of Chicago, the resultant absence of any location of the subject Church for its services, the necessity of dividing its parishioners for services at other Greek Orthodox Churches in the Chicago area, and the overall plans conceived at the time of the variation, to locate the new structure of the St. Nicholas Albanian Orthodox Church of Chicago on the acquired land cleared for zoning by the variation at 2701-09 N. Narragansett Avenue, Chicago, Illinois.

The subject property at the time of the variation on June 18, 1957, was located in a duplex residence district under the 1942 ordinance. Effective July 7, 1957 the said property was placed in an R3 District. Fortunately, under the new zoning the proposed Church is also a permitted use, and without the several restrictions as to front lot line and square feet area, the requirement of being surrounded by streets and alleys imposed by the 1942 ordinance, which necessitated the variation at that time. However, during the period when the Church was progressing with its architect for perfected plans and specification, and acquiring the necessary funds for completion of its structure, the 1957 ordinance was amended permitting off-site parking facilities as a Special Use in R4 or less restricted district, but prohibiting these off-site accessory uses in R1, R2 or R3 districts. Your computation indicates that, based upon maximum occupancy of the Church premises, sufficient on-site parking for 80% of the automobiles of the parishioners will be provided and that possible on-street parking will be negligible.

The Church, in our opinion, should be permitted to proceed with its structure at this location, based upon this historical background, regardless of its inability to provide off-street site parking under the ordinance. There has been a substantial change of position and expenditure and incurrence of obligations made in good faith under the variation heretofore granted and reliability of the Church upon the issuance of the permit. The Church has acquired a vested right and may complete the utilization of the premises for the Church originally authorized—*1550 North State Corporation v. City of Chicago*, 15 Ill. 2d 408, and *Deere Park Civic Association v. City of Chicago*, 347 Ill. App. 346.

We are transmitting copy of this letter to Hon. John P. Maloney, Zoning Administrator, together with our letter to him recommending the issuance of the permit. We are returning the documents submitted.

VESTED RIGHTS IN VARIATION

(Zoning Administrator—E. W. P.—April 4, 1961)

We have your letter of March 10, 1961, in which you enclose a copy of variation on zoning granted May 21, 1957 relating to property at 6248-58 S. Halsted Street and 800-10 W. 63rd Street, Chicago, Illinois, and in which you advise that you have on file an application for a building permit to construct a retail store on the above property wherein there will be no off-street parking and apparently it seems impossible for the owner to acquire off-site parking in the area.

The resolution of May 21, 1957, Calendar No. 320-57-Z, granted the variation in the application of the use district regulations of the zoning ordinance and authorized erection of a one-story brick retail store building, 116 x 139 feet, lacking adequate off-street parking and loading facilities on these premises on condition that all other ordinances of the City of Chicago shall be complied with and that the plans in triplicate shall be identified as the plans approved by the Board of Appeals, and the Commissioner of Buildings, under that resolution, was ordered to issue the building permit in conformance with the provisions of the resolution.

Investigation discloses that all arrangements had been made and expenditures incurred, but that there was a delay in the furtherance of the completion of the building. However, the plans had been approved and authorization for the building permit has been made.

It is, therefore, our opinion, based on the Court decision in the case of *Deere Park Civic Association v. City of Chicago*, 347 Ill. App. 346, that the applicant has acquired a vested right to construct this building and use the premises for the purpose authorized, and that the permit should issue.

SPECIAL USE

(H. I. K.—E. W. P.—June 5, 1961)

We have your letter of April 28, 1961 in which you enclose communication received from the law firm of Deutsch & Peskin, and request an opinion as to whether you should issue a permit for the construction of a new auto-laundry-Service Station to be located in a C2-3 district to replace the present auto-laundry and gasoline service station now located at 4900 North Broadway, Chicago, Illinois. The new station would meet all the regulations of the district and would be an improvement over the present structure.

This use is a Special Use under the Zoning Ordinance in a M-3 District and could not be approved as a newly established use without the approval of the Board of Appeals. However, Section 5-10 relating to existing Special Uses provides:

"Where a use is classified as a Special use under this comprehensive ordinance and exists as a Special or Permitted use at the date of the adoption of this Comprehensive Amendment, it shall be considered to be a legal Special use."

It is our opinion that because the present use established there as a legal use, it may be replaced with the improvement subject to the regulations of the C2-3 district, and that the permit should issue.

SCOPE OF ZONING ORDINANCE

(T. F. F.—E. W. P.—June 5, 1961)

We have your letter of May 31, 1961 in which you ask our opinion as to whether or not residents of a block occupied by brick homes can in any way prevent a party from moving a frame home to the block as long as it is not substandard. You state that many of the homes in the pathway of the Expressway are frame and the Morgan Park Civic League is of the opinion that since the new locations are within the fire limits that you can prevent these frame homes from being moved.

The situation that you describe, in our opinion, is controlled by the provisions of Chap. 50 of the Municipal Code, Sections 50-4.1 and 50-4.2, particularly and by inference to other sections of this Chapter and, in addition, thereto, the applicable provisions of the Chicago Zoning. Registrations for building work, including moving structures, are also contained in Chap. 42 of the Code.

We checked this matter with the Building Dept. and also the Fire Prevention Bureau and there is nothing that can stop an existing building from being moved onto another location provided there is proper zoning and the location requirements are complied with in accordance with Chap. 50, the fire resistant provisions apply, also in accordance with Chap. 50, and proper registration is made in accordance with the provisions of Chap. 42.

ZONING VARIATIONS—PUBLIC OPEN SPACE

(Chairman, Zoning Board of Appeals—E. W. P.—July 24, 1961)

We have your letter of July 6, 1961, with reference to the above application. The subject property is presently occupied by single story stores and it is proposed, if the requested variations are allowed, to demolish these stores and erect a high rise apartment building at this location. Ownership of the corner (Bryn Mawr Avenue overlooking the Outer Drive and Lincoln Park) is held by the same individuals as the Brockton Apartment Building immediately adjacent to the north. The stores are vacant and boarded up awaiting the determination of your Board.

The subject property located at the northwest corner of Bryn Mawr Avenue and Sheridan Road was diminished in lot area by the widening of Bryn Mawr Avenue in order to accommodate the Outer Drive off of Sheridan Road at this point. You state that three thousand square feet (3000) were taken from the property for the widening and because of this twenty-one thousand square feet (21,000) of floor area in his B4-5 zoning district were lost (3000 x 7), the maximum floor area formula under Section 8.5-4 of the Ordinance). The contour of the proposed building when projected would overlook the Outer Drive, and the side lot line would adjoin this public open space, meeting the requirements of the definition contained in the Ordinance and the specifications of Section 8.5-4, quoted and explained in this letter in answer to the questions which you ask in your communication.

You stated that the variations requested for the construction of the multi-story building include a 20 foot rear yard instead of 30 feet. This variation you could readily grant under your powers and it would be uniform with the buildings to the north. The applicant also wishes to have taken into consideration the loss of the three thousand square feet (3000) vacated

by reason of a public improvement and also the fact that the building would overlook the Outer Drive and Lincoln Park, thus qualifying it for the 15% advantage indicated in Section 8.5-4. We consider that this part of the application is an appeal from the decision of the Zoning Administrator in refusing a permit, for it is our opinion that the specifications come within the purview of the Zoning Ordinance.

The definition in the Ordinance of a "public open space" is any publicly owned open area included but not limited to the following: *Parks*, *Playgrounds*, *Beaches*, *Waterways*, *Parkways* and *Streets*." (Italics supplied.) Section 8.5-4 provides as follows:

"Where the front or side lot line of a lot adjoins a public open space which is at least five acres in area and of a depth perpendicular to such front or side lot line of not less than 200 feet, the floor area ratio for such lot may be increased by 15 per cent."

It is our opinion that the size of the public open space adequately meets the requirements to permit the increase of the floor area ratio by 15 per cent. This will provide the required maximum floor area ratio without consideration of your inquiry as to compensation for the loss of floor area ratio because of the taking of the property. There is another element that could be considered, too, if necessary. Section 5.7-6 provides:

"In all cases where two or more contiguous zoning lots are in common ownership and there was at the adoption date of this comprehensive amendment an existing building on one of such lots with less than the permitted maximum floor area ratio, the owner may elect to add the unused portion of the floor area ratio of the existing building to the maximum permitted floor ratio of any addition to the existing building to be constructed on the adjoining zoning lot; . . ."

We find nothing in the Ordinance to prohibit the allowance of attendant parking in a B4-5 area. Ample spaces for off-street parking are present, according to the information contained in your letter. We further understand that the basement garage of this new project will have an opening to connect with the existing garage of the Brockton Apartments immediately to the north, which has additional spaces to the number required for the use of the existing building that can serve the proposed building. Furthermore, the Board has the power, under Section 11.7-4, (4), to reduce to some extent the applicable off-street parking requirements. However, it would be much preferable that the applicant in this case supply the full number of spaces necessary, or more, by using all of the available space whether attended or unattended.

It is, therefore, our opinion that you have the power to grant the application on the basis of the applicable provisions in the Zoning Ordinance.

FRONTAGE DEFINED

(Zoning Administrator—E. W. P.—July 28, 1961)

We have your letter dated July 24, 1961, in which you enclose a communication, addressed to you, regarding Lots 1 and 30 located at Berwyn and Cumberland Avenues. You quote from the letter which says that the application "has 'side yards fronting on Cumberland Avenue which is a full section street.'" (Cumberland Avenue is a half section street.)

The intention of the writer was to obtain advantage of lesser minimum lot size requirements in an R3 District which would reduce the requirement

from 2500 square feet per unit to 1650 square feet per unit. You state that inasmuch as the lots face Berwyn Avenue that there could be no frontage on Cumberland Avenue.

The language of Section 7.5-3, relating to minimum lot area in an R3 District, is as follows:

"... except in an R3 District which fronts on a Section Line Street, Half-Section Line Street, or the following Major Diagonal Streets (naming certain specified streets not necessary for this opinion), there shall be provided not less than 1650 square feet of lot area per dwelling unit."

Black's Law Dictionary defining "Fronting" states as follows:

"Very often, 'fronting' signifies abutting, adjoining, or bordering on, depending largely on the context. *Rombauer v. Compton Heights Christian Church*, 328 Mo. 1, 40 S. W. 2d 545, 551."

"Frontage" means that part of the parcel sought to be rezoned that gives access frontage on a roadway, alley or other public way. Property that is adjacent and contiguous to a stream, highway or road may be said to have frontage thereon. *Standard Oil Co. v. Kamradt*, 319 Ill. 51.

The lots that you designate are both located at Cumberland and Berwyn Avenues, one of them on the north side of Berwyn Avenue and the other on the south side of Berwyn Avenue, and it is our opinion, based on the legal definition and on the Supreme Court decision, that both of them abut on Cumberland Avenue and have access frontage on Cumberland Avenue and, therefore, qualify for the provision of 1650 square feet per dwelling unit.

ACCESSORY USE

(Deputy Commissioner of Buildings—E. W. P.—October 27, 1961)

We have your letter dated October 16, 1961, relating to the subject property, to which letter you attach letter of same date addressed to you, copy of refusal issued by the Zoning Administrator's office and copy of application for building permit to construct an auto body burning kiln (incinerator) at this site.

The property is located in a heavy manufacturing district, zoned M3, and used by Kensington Waste Material Company engaged in the business of storing, disassembling and bailing automobile scrap iron for over 40 years. The certificate of survey, which accompanies the application, discloses that the property is properly zoned for this use, lying between the railroad beds of Michigan Central Railroad, Kensington & Eastern Railroad and Pullman Railroad. The area of the subject property is 94,762 square feet (2,175 acres) and the incinerator site is well within these boundaries.

It is our opinion that the incinerator desired, although large in its scope, at this particular location would not be contrary to the purposes of the ordinance as expressed in Article 2, but would tend to promote the public health, safety, comfort, convenience and the general welfare of the people of Chicago. An incinerator in the proximity of residential uses might not serve these purposes, but in this instance for this heavy operation at this industrial location would alleviate some of the objectional features of smoke and open burning over a larger area into the neighborhoods removed from the railroads.

The use in our opinion on this particular premise falls within the classification of an accessory use under Section 3.2 of the ordinance. It serves the principal use, contributes to the convenience of the owner of the principal use as well as to the public and cannot constitute a nuisance. It does not fall within the category of the special use designated in Section 10.4-3, subsection (2) Municipal Incinerators.

It is therefore our opinion that because of the circumstances in this matter that the permit for the installation and use of the auto body burning kiln at the subject premises should issue.

SPECIAL INSTANCES OF EXEMPTIONS

(City Architect—E. W. P.—November 3, 1961)

We have your letter of September 22, 1961, with reference to the construction of the Southwest Incinerator at 1400 West Pershing Road. You state that in making application for the building permit you were advised by the Department of Buildings that the occupancy of this site is a violation of the zoning provision of the Municipal Code of Chicago.

You further state that the site was previously used for a Municipal garbage reduction plant, subsequently for a refuse transfer center, and you have determined that there is no other site fulfilling the requirements of the operation available in the general area.

It is our opinion that this is a very essential governmental function and in addition thereto that the site as previously used for a garbage reduction plant and later for a refuse transfer center by the Municipal authorities that the method of disposal by way of the incinerator at this particular location comes within the purview of the improvement of the public health and welfare. It is, therefore, our opinion in this special instance that you should be permitted to proceed and that the permit should issue.

“WALK-UP WINDOW”

(Commissioner, Department of Streets and Sanitation—E. W. P.—November 21, 1961)

We have your letter of October 20, 1961, in which you refer to your previous communication of September 22, 1961, and our reply of October 2, 1961, relating to the legality of installing the Mosler Safe Company's "Walk-Up Window." Our opinion then was with reference to the installation of the window on the street or on the sidewalk. You now propound six inquiries embracing the same number of situations. We cannot specifically answer each question without reference to the particular facts in each instance, but we will generally state our opinion as follows:

With reference to the first question where the "Walk-Up Window" is installed so that the entire installation is on private property, with no overhang over the public way, it is anticipated the user is not using the public way and this installation is legal. However, the user would have to observe all traffic regulations and could not be excused because he spent time with his transaction, he would be subject to all other applicable ordinances.

Our answer to the second question would be the same, that the installation is legal where the installation is all on private property and the

patron stands on private property while transacting business. Again, he would be subject to violating any other laws if he did, including traffic laws.

In answer to the third inquiry where it is contemplated that there will be congestion on the public way, the installation in our opinion would be subject to your discretion, depending upon the circumstances.

In answer to the fourth inquiry, if the patron is obliged to stand on the public way while transacting the business, the installation is not legal.

In answer to the fifth inquiry that if the installation is the same as No. 4, except that there would be even more congestion on the public way, the installation would not be legal.

In answer to the sixth inquiry, the City could not assume any responsibility with regard to providing any special protection for any of the methods of installation, except, of course, the protection universally provided.

TRAILER CAMP ORDINANCES

(Deputy Commissioner of Buildings—E. W. P.—December 15, 1961)

We have your letter dated December 7, 1961, referring to trailer Camp Ordinances, Sections 179-9, 179-17.1 and 179-17-2. We attached a Memorandum from the Chief Housing Inspector, James R. Jung, addressed to you, in which he requires a legal opinion.

The first inquiry made by Mr. Jung reads as follows:

Are the "Rules & Regulations for Trailer Coach Parks," promulgated in accordance with "An Act in relation to the licensing and regulation of trailer coach parks", and filed with the Secretary of State, State of Illinois, on May 29, 1958 by the Director of Public Health, included within the provisions of sections 179-9 and 179-17.1?

The provisions governing Trailer Coach Parks in the Statute is contained in Chapter 111½, commencing with Paragraph 158, and through Sections 1 through 21. There were a number of amendments to this Act approved August 19, 1961. However, Section 21 remains the same and provides as follows:

"If the provisions of this Act as to location, construction, layout, sanitation, operation and maintenance are met as minimum, then this Act shall not apply in any county, city, village or incorporated town which provides for the licensing and regulation of trailer parks. . . ."

Section 9 with reference to rules and regulations in the Statute reads as follows:

"The Department shall, by reasonable rules and regulations, specify the number of water closets, lavatories, and baths or showers required for service of dependent trailer coach sites and the number of laundry facilities required for all trailer coach sites."

It is our opinion that Section 8.9 of the Act pertaining to Rules and Regulations of the State Department has no application, as far as the City of Chicago is concerned, and is not included within the provisions of Sections 179-9 and 179-17.1.

The location, construction, layout, sanitation, operation and maintenance, as provided in the Act, must be met as a minimum and when this

is done any rules and regulations adopted by the Department of State do not apply. The City of Chicago has a certificate of exemption, in accordance with the provisions of Section 21.

Your second inquiry concerns the existing trailer camp sites at 13413 South Indiana, 2772 East 75th Street, and 13240 Avenue "F" in the City of Chicago. You advise in your letter that they were never approved for license in accordance with Section 179-3 and you ask whether or not they should submit new application with proper plans and permits conforming to existing amended ordinances regarding Zoning, Building, Housing, Electrical, Plumbing and the applicable provisions of Chapters 8.1, 8.3 and 185, administered and enforced by the Department of Public Works. It is our opinion that the application should be made showing conformance with Zoning, Building, Electrical and Plumbing requirements subject to the provisions of Section 179-17.2, which provides as follows:

"The connection of utilities, plumbing, temporary porch, canvas roof, canopy or skirt to a house car trailer shall not be construed as converting said house car trailer into a single dwelling nor shall it be subject to the requirements of buildings, sanitary and zoning provisions for a single dwelling."

The provisions with reference to Housing would not be applicable to trailer camps in view of the language of Section 179-17.2 the applicant must conform to applicable sections of Chapters 8.1 and 185. Chapter 8.3 pertains to Department of Port of Chicago and therefore would have no application.

Your third inquiry is as follows:

"Does Section 179-17.2 as amended June 30, 1961, limit jurisdiction of Building, Sanitary and Zoning provisions to the property line, within the overall trailer grounds, up to the trailer site, within the trailer site to the exterior body of the trailer coach, or within and including the interior of the trailer coach itself?"

It is our opinion that Section 179-17.2 does not limit jurisdiction of Building, Sanitary and Zoning provisions to the property line or within the overall trailer grounds or up to the trailer site, within the trailer site to the exterior body of the trailer coach, but that the said Section 179-17.2 specifically states that the house car trailer shall not be construed as converting said house trailer into a single dwelling nor should it be subject to sanitary and zoning provisions for a single dwelling and, therefore, the Building, Sanitary and Zoning provisions are not applicable within and including the interior of the trailer coach.

ADVERTISING RESTRICTIONS

(City Traffic Engineer—E. W. P.—January 23, 1962)

Your inter-office communication of September 8, 1961, in which you attach a letter from P. Lorillard Company concerning advertising on their business vehicles when such vehicles are using Lake Shore Drive and our boulevards, is before us. Mr. Seiler, in the letter from the Company, advises that they operate approximately 22 business vehicles in the City of Chicago and that it is their intention to place advertising material on the sides of these vehicles. He also states in his letter that he is of the opinion that the use of these vehicles with advertising material on them are prohibited from using the Outer Drive and certain boulevards and Mr. Seiler asks that we please inform him in writing whether or not he is correct.

The Outer Drive itself and the boulevards would be, to a considerable extent, located in residential districts. The only permitted signs in all residential districts are name plates for dwelling units, not exceeding 1 square foot in area, identification signs for multiple family dwellings and for sale or rent signs embracing the dwelling, church bulletins and signs accessory to parking areas or designated exits or entrances. All other signs are prohibited in residential districts.

Pertaining to advertising signs in Business, Commercial and Manufacturing Districts, Section 8.9 subsection (4), Section 9.9 subsection (4) and Section 10.14 subsection (4) prohibits any advertising sign within 400 feet of specified public parks or the main roadway of specified major routes. This includes public parks of ten or more acres, all expressways and toll roads, Lake Shore Drive, portions of the Comprehensive Super-highway System of the City of Chicago and such other parks, streets, or portions thereof as the City Council shall designate.

It is our opinion that in view of the prohibition for advertising signs in residential districts entirely, and in all other districts within 400 feet of the Outer Drive and designated expressways and toll roads, super-highways and parks, boulevards, etc., that these prohibitions include signs on business vehicles. The intent of the legislation is to prevent obstruction of the view of the pedestrian and the attraction would be equally and probably more visible of a sign located on the vehicle than on a building within 400 feet of the center line of a road.

It is therefore our opinion that vehicles containing advertising material on their sides are prohibited by the quoted sections of the Chicago Zoning Ordinance.

NON-CONFORMING USE SUBSTITUTION

(Chairman, Zoning Board of Appeals—E. W. P.—June 7, 1962)

We have before us the application of C & G Amusement Corp. to expand an existing outdoor amusement establishment to include Teen-Cars in an M-2-2 General Manufacturing District. The Applicant wishes to substitute the Teen-Cars operation for an amusement use of 10 live ponies and a gasoline fueled Fire Engine. The Applicant has operated its amusement business since 1950, prior to the present zoning ordinance and the use is, therefore, non-conforming and is also a Special Use in B4, B5 and C1 and C3 Zoning Districts.

You had orally requested our opinion when you transmitted the file to us as to whether or not the proposed use is a proper substitution of non-conforming use. The outdoor amusement use should be classified as a non-conforming use of land. Section 6.6-3 of the ordinance provides that this use cannot be changed to any other use except to a use permitted in the district in which the land is located. It is our opinion, however, that a replacement of one amusement device for another in an area used generally for outdoor amusements does not constitute a change of use. The data given in the application further indicates that there is no expansion or extension in the use beyond the area it occupies and, therefore, the proposed use is not contrary to Section 6.6-1 of the ordinance.

We understand that the instant Applicant is agreeable and anxious to have such conditions incorporated in your resolution to fully safeguard the operation for these Teen-Cars and to comply with restrictions recommended and embraced in the order of the Board. The Applicant has also indicated that it can and will cover adequate insurance for this operation.

The area is bordered on all sides for hundreds of feet by railroad property and the use cannot be averse to any adjacent uses. It is therefore our opinion that the application can be granted under the ordinance and that the proposed operation should be allowed upon such conditions as may be recommended and approved by the Board of Appeals.

We are returning the file transmitted to us.

CHURCH IN A BUSINESS DISTRICT

(Zoning Administrator—E. W. P.—November 5, 1962)

We have before us a resolution for the approval of an application for a special use for the location and the erection of a one-story brick community center, 45 by 100 ft., in a B2-1 Restricted Retail District, on premises at 3432-36 W. Foster Avenue, Chicago, Illinois.

It was found by the Board of Appeals after a full public hearing that the proposed use was necessary for the public convenience at that location and is so designed, located and proposed to be operated that the public health, safety and welfare will be protected, and that the proposed use will not cause substantial injury to the value of other property in the neighborhood in which it is to be located.

The Commissioner of Buildings, under that resolution, was ordered to issue a permit on condition that all ordinances of the City of Chicago shall be complied with and that plans in triplicate shall be identified as the plans approved by the Board of Appeals before a permit would issue.

On January 6, 1959 the Board of Appeals granted an extension of time for the permit until July 15, 1959. However, the Church for which this special use was permitted underwent financial reverses for a period of time and have been unable to locate and complete the structure. The Church is now in position to go forward with its plans. We have checked the location and find the situation is not changed. In view of the decision in the case of *Columbus Park Congregation of Jehovah's Witnesses, Inc., et al., Appellants, v. The Board of Appeals of the City of Chicago, et al., Appellees*, permitting a church in a business district where it has been determined that it is for the public convenience and will not adversely affect the surrounding area, it is our opinion that the use desired here should be granted and that the application and the plans should be processed and the permit issued, in accordance with the resolution of the Zoning Board of Appeals and provided all other requirements of the Municipal Code are met. We are enclosing copy of the resolution, the application, Structural Design Data and certificate of the Architect that the proposed use complies with all performance standards.

POWERS TO CHANGE IN BOARD OF APPEALS

(Alderman, 5th Ward—E. W. P.—November 19, 1962)

We have before us your letter of October 16, 1962, in which you request an opinion on a problem which is of great seriousness to your immediate community in the Hyde Park redevelopment area known as Hyde Park A, originally a Land Clearance Commission redevelopment. The question involves the right to public use of a private driveway immediately north of 55th Street which runs from Harper to Blackstone Avenues, Chicago, Illinois. The matter directly and legally involved is the interpretation of the effect

of an order of the Board of Zoning Appeals entered on April 23, 1959, in cases 54, 56, 57, 58, and 72-79—59 Z. The part of the order which you desire interpreted reads as follows:

"As a condition of the entry of the above orders and the acceptance thereof by the applicants in each instance (with the exception of case #54-59-S), we find and provide as follows: the driveway running west of Harper Avenue to Blackstone Avenue north of 55th Street and the driveway running east from Ridgewood Court to Dorchester Avenue, as shown in the attached map and in other maps, plans and drawings introduced in evidence, shall not be maintained and used as private drives, but shall at all times be maintained and used as drives open to automobile traffic for all of the public: that such drives shall be constructed in the manner presently shown on the plans presented to or described to the Board, and that these drives shall at all times be maintained as such driveways open to the public, as provided in the city ordinance above referred to and as herein provided."

The first question that you propound is whether or not the Board of Appeals had power to prescribe the condition as recited. Section 11-13-4 of the Zoning Enabling Act in the Municipal Code of 1961, after setting out the rules governing the determinations of the Board of Appeals with reference to variations, provides as follows:

"* * * The corporate authorities may provide general or specific rules implementing, but not inconsistent with, the rules herein provided to govern determinations of the board of appeals. * * *

The particular applications as described in the Board's letter of April 23, 1959, concerned applications in the nature of special uses and the City Council in implementing general or specific rules governing special uses set forth in detail under Sections 11.10-1 through 11.10-5, the purposes, the authorization, the standards and the conditions that should be imposed. Section 11.10-5 provides that the Board of Zoning Appeals may provide such conditions on restrictions upon the construction, location and operation of a special use, including but not limited to provisions for off-street parking and loading, as shall be deemed necessary to secure the general objectives of the zoning ordinance and to reduce injury to the value of property in the neighborhood.

It is our opinion that the Board of Appeals have the power to prescribe the condition as set forth in their resolution and order of April 23, 1959.

Your second inquiry is as to whether or not the condition is legally binding on the owners of the adjoining property who hold title to the driveway. It is our opinion that the adjoining owners having accepted the benefits of the resolution and order are bound by the condition imposed. It is our opinion further that this situation is analogous with the holdings of the Supreme Court in Illinois concerning orders or decrees in the State courts and that where an order or decree granting a right at the same time imposes on the person securing that right a concurrent obligation, the presence of such obligation is a condition precedent to the enjoyment of such right, *Hammerschmidt v. Highway Comrs.*, 286 Ill. 448 at p. 453; *Caldwell v. Commissioners of Highways*, 249 Ill. 366. We believe, however, that the situation would be on more sound ground if the owners of the adjoining properties, who were the recipients of the benefits of the resolution, would execute a covenant running with the land incorporating the condition as provided by the Board.

We will answer your inquiry number 5 before making our observations with respect to inquiry number 4. In number 5 you ask whether the word "automobile" includes trucks. Our answer is in the negative because the basis on which the driveway was furnished was in response to applications for locations and establishments of parking lots for the storage of private

passenger automobiles and for providing off-street parking for multiple units. And, further, that the intent as expressed by the Board in the body of its resolution was to deny access by any business interest.

In answer to inquiry number 4, the use of the driveway could be restricted to passenger automobiles and the condition as quoted by the Board in its resolution must apply. Whatever other restrictions can be placed in order to accomplish the intent of the condition is in our opinion a matter of determination by conferences with the parties in interest.

In answer to inquiry number 6, inasmuch as the owners themselves feel that it would be more desirable to have the one-way street changed in the opposite direction to the direction suggested by the Board of Appeals, it is our opinion that this could be resolved provided the residents and the adjoining business people are agreeable.

PARKING LOT AS A SPECIAL USE

(Deputy Zoning Administrator—E. W. P.—December 17, 1962)

We have your letter dated December 13, 1962 in which you attached two letters, one from the Greater North Michigan Avenue Area and the other from the Ambassador Hotels of 1300 North State Parkway, Chicago, Illinois, together with a Board of Appeals resolution.

You advise in your letter that the Ambassador Hotels have been using lots from 1301-1311 N. Dearborn Street, inclusive, for off-street parking for guests of the hotels, which is a special use granted by the Zoning Board of Appeals in accordance with the resolution of April 19, 1960, under Cal. No. 217-59-S. You further state in your letter that the hotel has recently demolished a building at 1315 N. Dearborn Street for the purpose of expanding this special use. Your inquiry is as to whether or not the Ambassador Hotels can expand this special use on the vacated property without further action by the Board of Zoning Appeals.

Reference is made to Section 5.10 of the Zoning Ordinance which provides:

"Where a use is classified as a special use under this comprehensive amendment, and exists as a special or permitted use at the date of the adoption of this comprehensive amendment, it shall be considered to be a legal special use. . . ."

It is our opinion that the installation and operation of the proposed special use will be an integral part and continuation of the nature and purpose of the classification of a parking facility for the Applicant. (*Howard, et al., Appellants, v. Lawton, et al., Appellees*, 22 Ill. 2d 331.) The Board of Appeals in its opinion and resolution of April 19, 1960 found that the proposed use was necessary for the public convenience and would be so designed, located and operated that the public health, safety and welfare will be protected and that it could not cause substantial injury to the value of other property in the neighborhood, provided that said use is temporary to be continued for a period of not more than five years from April 19, 1960.

It is our opinion that the special use should be granted in accordance with applicable law and that the same restrictions attached to the original special use granted April 19, 1960 should govern, including the limitation of the use for five years from April 19, 1960.

CHURCH DEFINED FOR ZONING PURPOSES

(Acting Commissioner, Department of Buildings—E. W. P.—March 18, 1963)

We have your letter dated March 15, 1963 in which you advise that plans and application for a building permit to erect a one story filling station on the northeast corner of 63rd Street and Princeton Avenue, addresses 300-302 W. 63rd Street and 6246-6254 S. Princeton Avenue, Chicago, Illinois. You advise also that the proposed gas station complies in all respects with the Chicago Zoning Ordinance and the Building Code with the possible exception of Section 40-8. The plans submitted indicate that the filling station is proposed to be located less than 200 feet from a garage building now being used for a "House of Worship" at 6236-6238 S. Princeton Avenue, Chicago, Illinois.

The memorandum from Mr. John C. Kucharik, Chief Plan Examiner, indicates that a permit was issued March 16, 1910 for a building 53' 0" wide x 130' 0" long x 18' 0" high for use as a garage and that there is no record of any other permit having been issued. The present use was not present until about five years ago and the Zoning under the 1957 Ordinance is B4, under which classification a church is not a permitted use.

The question presented for our determination is whether or not the present use at this address is within the meaning of the word "church" as used in Section 40-8 of the Municipal Code and Section 127-5 of the Municipal Code. It is our opinion that in order to come within this provision it would have to be lawfully established under the Zoning Ordinance. However, the members, numbering about thirty, of the congregation are meeting at this address even though there is no building or edifice designed as a church and even though a church was never lawfully established. In a previous opinion of the Corporation Counsel we have stated:

"The word 'church' may be used as signifying a society for religious worship, also as meaning an edifice consecrated to religion. As used in the ordinance, it has reference to the church edifice."

In *People v. Dalton*, 30 N. Y. Suppl. 407, it was held that a building in which the first floor was used for religious meetings and the rest of the building for offices of directors, physicians and others, the whole constituting a mission, but not connected with any church society is not a church within the law forbidding the issuance of a license to sell liquor within a certain distance of a building used as a church. In *State v. Midgett*, 85 N. C. 538, the court stated that there is a distinction between "church" and "place of worship" which is recognized by law, and that a statute, which includes a "church or place appointed for divine worship" is broader than one that relates to "church". In *Howell v. City of Philadelphia*, 8 Phil. 280, the question involved was whether a church edifice purchased by private parties was a "church" within the statute. It was stated that a "church" is a structure dedicated as a regular place of religious worship.

In view of all the facts and circumstances and the reasoning employed in the cases cited, it is our view that the garage building within 200 feet of the proposed gasoline filling station, which garage building is now used as a "House of Worship", is not a church within the meaning of our ordinances. It is therefore our opinion that a license may properly be issued to the applicant for the premises designated in the application as a new filling station which complies in all respects with the Zoning Ordinance and the Building Code.

EFFECT OF ZONING ORDINANCE ON BUILDING RESTRICTION

(Acting Commissioner of Buildings—E. W. P.—March 22, 1963)

We have before us your letter of March 20, 1963 with reference to the above subject matter. You advise that on December 6, 1962 a building permit was issued to erect a two-story four-unit apartment building in an R-4 zoned area. The minimum front yard requirement in an R-4 general residence district is fifteen feet, which requirement was so indicated on the building application for permit. The plat of survey submitted with the plans showed a dotted line parallel to the sidewalk with the notation "25 ft. Building Line", with no additional reference.

You further state that excavation and foundation work proceeded until March 18, at which time, after a complaint by the Alderman of the ward, it was brought to the attention of this department that there was on record in the Office of the Recorder of Deeds of Cook County a covenant and restriction of a twenty-five foot setback in the original deed evidenced by document No. 3379915 recorded April 23, 1903, which restriction apparently runs with the land.

You invite our attention to Article 5.1(3) of the Ordinance which reads as follows:

"This comprehensive amendment is not intended to abrogate any easement, covenant, or any other private agreement provided that where the regulations of this comprehensive amendment are more restrictive (or impose higher standards or requirements) than such easements, covenants, or other private agreements, the requirements of this comprehensive amendment shall govern."

Amongst the objectives in the Intent and Purpose of the Ordinance in Article 2 are contained the following:

"(3) To protect the character and maintain the stability of residential, business, commercial, and manufacturing areas within the City, and to promote the orderly and beneficial development of such areas;

(8) To prohibit uses, buildings or structures which are incompatible with the character of development or the permitted uses within specified zoning districts;

(12) To prevent the overcrowding of land and undue concentration of structures, so far as is possible and appropriate in each district, by regulating the use and the bulk of buildings in relation to the land surrounding them;"

We further call your attention to the preceding paragraph to Section (3) of Article 5, which is Section (2) of the same Article, which reads as follows:

"(2) Where the conditions imposed by any provision of this comprehensive amendment upon the use of land or buildings or upon the bulk of buildings are either more restrictive or less restrictive than comparable conditions imposed by any other provision of this comprehensive amendment *or of any other law*, ordinance, resolution, rule or regulation of any kind, the regulations which are more restrictive (or which impose higher standards or requirements' shall govern." (*Italics supplied.*)

There are a number of decisions in the Supreme Court upholding the validity of covenants running with the land and you quote from one of these applicable opinions in your letter, as follows:

"A valid restriction upon the use of property incorporated in deeds, by which the owners hold title, and which in no way threatens the safety, health, comfort, or general welfare, is neither nullified nor superseded by adoption of a zoning ordinance." *Finn v. Emmaus Evangelical Lutheran Church*, 1946, 329 Ill. App. 343, 68 N. E. 2d 541.

It is the duty and responsibility of the owner of the property under the ordinance and under the law to comply with a valid covenant in the deed, and it is our opinion that the construction must proceed accordingly with a revised plan to comply with the covenant. This condition having been brought to the attention of the Building Department, it is also our opinion that the permit insofar as would permit the owner to abrogate the covenant should be rescinded and revoked and that the owner must comply with the restrictions.

JURISDICTION OF ZONING BOARD

(Chairman, Zoning Board of Appeals—R. J. E.—April 24, 1963)

You requested an opinion regarding the above and in particular the MOTION TO DISMISS PROCEEDINGS filed by the North Dearborn Street Association wherein said motion alleges that the Zoning Board of Appeals has no jurisdiction to determine the question before the Board.

We call to your attention the opinion of the Corporation Counsel of December 17, 1962 addressed to the Honorable Harry I. Kane, Deputy Zoning Administrator, regarding the subject property. Said opinion is in response to an inquiry as to whether or not the special use previously granted to the Ambassador Hotels by the Zoning Board of Appeals in accordance with a resolution of April 19, 1960, under Cal. No. 217-59-S, can be expanded to the vacated property presently in question. Said special use is for off-street parking for guests of the hotels. The opinion states as follows:

"Reference is made to Section 5.10 of the Zoning Ordinance which provides:

'Where a use is classified as a special use under this comprehensive amendment, and exists as a special or permitted use at the date of the adoption of this comprehensive amendment, it shall be considered to be a legal special use. . . .'

"It is our opinion that the installation and operation of the proposed special use will be an integral part and continuation of the nature and purpose of the classification of a parking facility for the Applicant. (*Howard, et al.*, Appellants, v. *Lawton, et al.*, Appellees, 22 Ill. 2d 331.) The Board of Appeals in its opinion and resolution of April 19, 1960 found that the proposed use was necessary for the public convenience and would be so designed, located and operated that the public health, safety and welfare will be protected and that it could not cause substantial injury to the value of other property in the neighborhood, provided that said use is temporary to be continued for a period of not more than five years from April 19, 1960.

"It is our opinion that the special use should be granted in accordance with applicable law and that the same restrictions attached to the original special use granted April 19, 1960 should govern, including the limitation of the use for five years from April 19, 1960."

It is our opinion that the Board does have jurisdiction to determine whether or not said special use should be expanded. It is, therefore, our opinion that the motion to dismiss the proceedings should be denied.

EXEMPTION FOR MUNICIPAL BUILDINGS

(*Acting Commissioner of Buildings—E. W. P.—June 21, 1963*)

We have your letter dated June 20, 1963, in which you request our opinion as to whether or not the zoning ordinance is applicable to the location and construction of the Civic Center bounded by Randolph, Dearborn, Washington and Clark Streets. Our analysis through the City Planning Commission determines that the divergence from the ordinance is principally the lack of off-street parking spaces.

You call attention to our prior opinions in which we advised that it is the established law that zoning ordinances do not apply to the municipal government when the latter is in the exercise of governmental functions. The use of the Civic Center is for Courtrooms, the offices of the Clerk of the Court, the offices of the Health Board of the City of Chicago, accommodations for the Supreme Court Justices, and auxiliary uses, all of which comprise governmental function. The municipal corporation acts judicially and exercises discretion in the selection of this site and the adoption of the plan (*City of Chicago v. Sabin*, 165 Ill. 371).

It is the established law that zoning ordinances do not apply to the municipal government when the latter is in the exercise of these governmental functions (*Nehrbas v. Incorporated Village*, 159 N. Y. S. (2d) 145). It is our opinion that the Civic Center falls within this classification of governmental function and that the zoning ordinance is not applicable.

ZONING EXEMPTION FOR FEDERAL GOVERNMENT

(*Assistant Zoning Administrator—E. W. P.—June 28, 1963*)

We have your letter of June 25, 1963, in which you attach copy of letter dated June 19, 1963, from R. T. Stevens, Real Estate Officer of the Post Office Department, Chicago Regional Office, pertaining to the development of sites for the erection and lease of buildings to be used as post office buildings. We rendered an opinion on December 16, 1957, in Volume 24, Opinions of Corporation Counsel, advising that it is the established law that zoning ordinances do not apply to the Federal Government when it is the exercise of governmental functions, *Nehrbas v. Incorporated Village*, 159 N. Y. S. (2d) 145.

However, in Mr. Stevens' letter we are advised of the leasing program of the Postmaster General for the development of building plans for investors to submit proposals based on site acquisition, building construction per Department plans and specifications and lease to the Government for a term of years. He advises that in the case of construction of a sizeable building in the Chicago area the lease is generally for a firm 20 years, with renewal option running an additional 30 years. These site costs, Mr. Stevens states, can run into a considerable figure and he advises that in the assembly of the lease-back package every effort is made to present a clean-cut proposition to bidders. He states specifically that among other things this involves zoning which will permit the desired improvements within the scope of basic requirements that would make the project eligible for a building permit.

Under the formula presented by Mr. Stevens, the requirement for zoning is necessary for this is guaranteed, as we understand it, by the Postmaster General to the Lessor. However, we are bound by the present circumstances as to zoning for a particular use and we cannot anticipate what situation will be present 20 years from now. We should take into consideration each loca-

tion and this letter of opinion concerns only the proposed construction at 9308-28 South Chicago Avenue, which is zoned C2-2 and allows post office occupancy subject to a floor area ratio of 2.2. This provision in the ordinance presents no problem.

Mr. Stevens also advises that there is a maximum gross area of 18,750 square feet "devoted to manufacturing" in the ordinance. The provision in Section 9.3-1, subsection A (2), reads as follows:

"Business, Commercial and Manufacturing establishments are restricted to a maximum gross floor area of 18,750 square feet each, exclusive of any floor area devoted to off-street parking or loading facilities."

The use would be classified as a Business use. In Section 3.2 of the Ordinance the provision is made that maximum gross floor area does not include any area devoted to off-street parking or loading, space devoted to mechanical equipment for heating or cooling purposes, space devoted to employees' facilities or accessory storage area when located below the ground floor. Therefore, from the 43,700 square feet should be subtracted the 2400 square feet of loading platform and in addition the space devoted to mechanical equipment, employees' lockers and toilet facilities, the mailing vestibule which also may be considered part of the loading platform, and accessory storage area below the ground floor. These additions, we feel sure, will approximate 2750 square feet and would leave 18,750 square feet or less for the actual maximum gross floor area.

With reference to Section 9.11-1 pertaining to off-street parking, it is our opinion that this use comes with the classification of Subsection (3) which refers to Business Offices and Public Administration Buildings. However, in Subsection (30), should there be any question in your mind as to the proper classification it should be determined by the Department of City Planning. It is our opinion in view of all of the circumstances and subject to the mathematics discussed in this letter that the plans for the specific building can be processed and permit issued.

SETBACKS

(Zoning Administrator—E. W. P.—July 5, 1963)

We have your letter dated June 25, 1963, in which you advise that it is proposed that a 60 unit apartment building be built at the above address. You state that normally such a building would require a fifteen (15) foot setback.

However, analysis of the entire block in which this property is located shows that every building in the block is built on the lot line and this is the last vacant lot in this same block.

It is our opinion, that if these facts are true, it would be out of keeping with the intent and purpose of the zoning ordinance to permit a setback. Sub-section 8, Article VII of the ordinance specifically provides that uses should be prohibited which are incompatible with the character of development within the specified zoning district and Sub-section 3 provides that the character and the stability of the area promotes the orderly and beneficial development.

It is therefore our opinion, that should your analysis of the Sanborn Map demonstrate that the facts exist as stated in your letter that the owner of the property should be permitted to erect the building in accordance without reference to the setback provision.

UNCONSTITUTIONAL ZONING AMENDMENT

(City Council—M. J. H. & S. R. D.—June 4, 1963)

On May 29, 1963 the Supreme Court of Illinois denied the City's petition for a rehearing but modified its opinion of March 25, 1963.

The Supreme Court's opinion filed March 25, 1963, affirmed the decree of the Circuit Court of Cook County invalidating an amendatory B4-1 zoning ordinance adopted to replace a B2-1 zoning and restraining the City from enforcing the amendment in application to the northwest corner of N. California and W. Pratt Avenues, a frontage of 247.78 feet along California and 129.62 feet along Pratt.

Plaintiffs on May 2, 1957 acquired title to the greater portion of the tract for use as an undertaking establishment. The property was then zoned for business use under which an undertaking establishment was permitted. At the time of the acquisition, the drafting of the proposed (1957) comprehensive zoning amendment was in the closing stages. The city planning and zoning experts had recommended that the subject property be zoned B2-1 in which an undertaking establishment would not be permitted. The Council did not accept this recommendation but incorporated in the 1957 Amendatory Zoning Ordinance (adopted May 29, 1957) an amendment to the draft proposed April 10, 1957, whereby the subject property was zoned B4-1. Under the B4-1 zoning an undertaking establishment is permitted.

On March 26, 1958, at the instance of local residents, an amendatory ordinance was introduced to change the zoning of plaintiffs' property from B4-1 to B2-1, a change which would prevent the use of the property for an undertaking establishment. The amendment proposed on March 26, 1958 was adopted November 25, 1958, more than six months after its introduction.

The Supreme Court held that the amendatory ordinance of November 25, 1958 was wholly void because it was not adopted within six months of its introduction as provided by Section 11.9-7 of the Chicago Zoning Ordinance. The Court held that Section 11.9-7 applies alike to amendments introduced by members of the Council and to those requested by property owners.

The Court further held that the plaintiffs bought the subject property (including a portion of the tract acquired on July 2, 1958) in reliance upon the B4-1 zoning which would permit its use for a funeral establishment; that the plaintiffs could not be deprived of that right of use by rezoning unless the public good required such a change; that where, as in this case, no change in circumstances is shown, the City may not argue that the amending ordinance of November 25, 1958 is more conducive to the public welfare than the provisions of the 1957 Comprehensive Amendatory Zoning Ordinance as adopted May 29, 1957.

In modifying the language of its original opinion, the Court withdrew a portion thereof tending to restrict unduly the authority of the Council to adopt zoning amendments, but declined to alter its views with respect to the requirement that such amendment must be adopted within six (6) months of its introduction in the Council.

We enclose a copy of the Court's opinion as modified.

"ZONING LOT" DEFINED

(Zoning Board of Appeals—C. O.—June 24, 1963)

In regard to your request for an opinion from the Corporation Counsel regarding your review of the decision of the office of the zoning administrator refusing to issue a permit to erect a two story brick four unit apartment building on the lot with an area of 3,332 square feet in an R4 General Residence District at 4404 N. Hermitage Avenue, it is the opinion of the Corporation Counsel that the decision of the office of the zoning administrator was correct. The reasons for the opinion are set forth as follows.

The factual evidence submitted by the petitioner in his plat of survey is inadequate as to side yard requirements and attached structures. It appears in the plat that the zoning administrator's decision based upon paragraph 5.7-2, Division of Zoning Lots, is correct in that the zoning ordinance specifically prohibits enlargement of the subject lot in question, which, through said enlargement, would then reduce the minimum lot standards and requirements of adjacent improved lots. Thus, it appears that the land acquired and added to the subject property diminishes lot 12 adjacent thereto to below minimum requirements.

It is to be noted that paragraph 5.7-2, Division of Zoning Lots, is concerned with the term "zoning lot". The definition of "zoning lot" appears on page 4A of the Ordinance, to wit:

"LOT, ZONING. A 'zoning lot or lots' is a single tract of land located within a single block, which [at the time of filing for a building permit] is designated by its owner or developer as a tract to be used, developed, or built upon as a unit, under single ownership or control. Therefore, the 'zoning lot or lots' may or may not coincide with the lot of record."

Thus, the question raised by Alderman Hoellen and the petitioner as to whether or not the subject lot is a lot of record is immaterial to the decision. In paragraph 7.5-4 entitled "Minimum Lot Area—R4 General Residence District" on page 14A of the Ordinance the term "lot of record" is to prohibit any residential use on a lot in this zoning area which is less than 1,650 square feet in area except for those lots of record which were in existence at the time of the passage of the 1957 amendment to the zoning ordinance. The exception in the provision is for the purpose of eliminating hardship that would fall upon property owners who, in good faith, held vacant lots that were below the minimum of 1,650 square feet. Thus, "lot of record" under this paragraph is limited to those cases involving a lot that existed before 1957 and which is less than 1,650 square feet in area. Here we are dealing with a zoning lot which is greatly in excess of 1,650 square feet. The question as to whether it is or is not a lot of record is inapplicable in this case.

In conclusion, we are of the opinion that the zoning administrator's decision is correct because under paragraph 5.7-2 the property acquired to create the subject lot reduces the pre-existing improved adjacent lot to below the minimum lot requirements required in an R4 zoning area.

PROXIMITY TO RESIDENTIAL USE

(Acting Commissioner of Buildings—R. J. E.—July 11, 1963)

On May 15, 1963, you requested an opinion regarding an advertising sign at the above location and more specifically the applicability of Subsection 5 of Section 9.9 of the Chicago Zoning Ordinance.

Your letter indicates that a permit was issued to Briggs Outdoor Advertising Company to erect the sign on April 19, 1963.

Although the sign is in excess of four hundred feet (400') of the center line of the expressway, it is within seventy-five feet (75') of the outer boundary of a R-5 General Residence District.

Subsection 5 of Section 9.9 of the Zoning Ordinance provides that "no advertising sign shall be permitted within 75 feet of any property in a Residence District."

In order to determine the problem we must consider whether there is a difference in the use of the words "Residence District" and "any property in a Residence District." If the latter phrase were not used, there would be no problem.

The word "property" is nowhere defined in the Chicago Zoning Ordinance. Therefore, it is necessary to determine the intent of the ordinance in the use of the phrase "any property in a Residence District."

Similar phraseology is found in Sections 7.11 (1), 7.12 (8)c, 8.10 (1), 8.11 (6)b, 9.10 (1), 9.11 (6)b, 10.15 (1) and 10.16 (6)b of the Chicago Zoning Ordinance. Sections 7.11 (1) and 7.12 (8)b of the ordinance are of particular note inasmuch as those sections apply to off-street loading and parking in *Residential Districts*. It would be redundant to use the phrase "any property in a Residence District" if that phrase meant any use of land located within the boundaries of a Residence District because it is the use of land in a Residence District that is actually being regulated.

There are other sections of the Zoning Ordinance where the intent is obviously to prohibit certain uses or require certain performance of standards within a proximate distance to a Residence District. (See Sections 8.9-7, 9.3-2A (4), 9.8, 9.8-4, 9.9-4, 10.3-B, 10.3-1 (1), 10.3-2, 10.3-3, 10.4-1 (12), 10.5 (3), 10.5-1, 10.5-2, 10.5-3, 10.6-2, 10.13-1, 10.13-2, 10.13-3.) In those sections the phrases "within the boundary of a Residence District" "abuts a Residence District", "adjoins a Residence District" etc. are used.

The property located within the R-5 District in proximity to the subject property is used for a public park and, as such, is unimproved with structures of a residential nature. Furthermore, the advertising sign is actually located in a C1-3 District. The face of the sign is not visible to any property in a Residence District inasmuch as the sign faces the expressway to the west.

It is therefore our opinion that the intent of the ordinance is to prohibit signs within seventy-five feet (75') of a residential use or property that could be used for residential purposes. Since the subject sign is not within seventy-five feet (75') of residential uses and is not visible to any property that is located in a Residential District, it follows that the sign does not fall within the purview of Subsection 5 of Section 9.9 of the Chicago Zoning Ordinance.

The permit issued on April 19, 1963, was properly issued and should not be revoked because of the Chicago Zoning Ordinance.

APPLYING ZONING ORDINANCE TO PLANNED DEVELOPMENT

(Commissioner of City Planning—E. W. P.—August 20, 1963)

We have your letter dated August 1, 1963, requesting our opinion as to whether a Planned Development may be designated within an official Conservation Area, under the provisions of the Chicago Zoning Ordinance. You quote that part of Article 3 (Rules and Definitions) of the Chicago Zoning Ordinance defining a Planned Development, as follows:

"... A Planned Development is a tract of land which is developed as a unit under single ownership or control, or which is under single designated control by a common ownership at the time it is certified as a Planned Development . . ."

It is our opinion that the Department of Urban Renewal has sufficient control in a Conservation Area within the definition of the term "Planned Development", particularly in view of the reason for Planned Developments also expressed in Article 3, which reads as follows:

"Planned Development. For the purpose of utilizing effectively the benefits inherent in large scale development of land including a more efficient and more economical development pattern, and a more attractive and varied arrangement of structure types and open spaces than is possible under standard regulations for single lots, a tract of land may be developed as a 'Planned Development' subject to the applicable zoning classification and the basic intent and purpose of this Zoning Ordinance."

PROCEDURE FOR PLANNED DEVELOPMENT

(Commissioner of City Planning—E. W. P.—August 30, 1963)

We have your letter of August 28, 1963 relating to the above subject. You attached copies of correspondence received from the attorneys acting in behalf of the owners of the property involved. You request our opinion as to whether the Department of City Planning may interpret the Planned Development as approved by City Council, and whether our office is in accord with the interpretation submitted to you by the owners' attorneys.

The "Rules, Regulations and Procedures" governing Planned Development amendments to the Chicago Zoning Ordinance as amended, effective June 27, 1963, provides on page 4 as follows:

"... In the event a revision is made in the street pattern, affecting the intensity of use of the project area or net site area, the applicant will be required to conform to all applicable regulations of the Planned Development as approved by the City Council. The net site area is the entire land area within the boundaries of the project or site, less the area of all land required or proposed for public use.

"If the applicant cannot comply with the regulations of the Planned Development, as approved by the City Council, the applicant has recourse to refer back to the City Council and request an amendment to the Planned Development.

"However, if the boundaries of the Planned Development are revised or major land use changes are proposed, the applicant *must* apply to the City Council for an amendment to the Planned Development."

It is therefore our opinion that the Department of City Planning may interpret the Planned Development as approved by the City Council and, in the event that you find that the applicant conforms to all applicable regulations of the Planned Development as approved by the City Council, you have the power to approve any suggested change affecting the intensity of use of the project area or net site area.

We have analyzed the ordinance and we are in accord with the interpretation submitted to you by the owners, i.e., there is nothing in the ordinance which prevents the owners from constructing elevator buildings in Squares B and C having 172 units in each Square, and there are no height limitations so long as the F. A. R. requirements, set-back requirements, off-street parking requirements, and percentage of land covered, periphery set-backs and distance between buildings requirements of the ordinance are complied with and so long as all the over-all requirements for the entire Planned Development limiting it to a maximum F. A. R. 0.8 and maximum dwelling units of 960 are also complied with.

We are returning the data you submitted which includes the pertinent provisions contained in this Plan of Development.

RESTRICTIONS ON VARIATIONS

(Chairman, Zoning Board of Appeals—E. W. P.—November 8, 1963)

We have your letter of November 7, 1963, in which you advise that an application has been filed for a variation to permit the use of the subject lot for a use otherwise prohibited solely because of the insufficient area of the lot. The property involved, you state, is at the northwest corner of Oak Street and Lake Shore Drive, which bears the addresses of 1000 Lake Shore Plaza and 130 E. Oak Street, in a B6-6 Restricted Central Business District. The applicant seeks to erect an apartment building consisting of 55 stories, containing 143 dwelling units, and from which he is presently foreclosed solely because the lot area is not sufficiently large to permit 143 dwelling units.

You ask for our interpretation of Section 11.7-4 (2) which, you believe, is the applicable provision in the ordinance covering the problem. This section reads as follows:

"Variations from the regulations of this comprehensive amendment shall be granted by the Board of Appeals only in accordance with the standards set out in Section 11.7-3 and may be granted only in the following instances, and in no others: . . .

(2) To permit the use of a lot for a use otherwise prohibited solely because of the insufficient area of the lot, but in no event shall the area of the lot be less than 90 per cent of the required lot area; . . ."

To construct the building with the 143 spacious apartments requires a minimum lot area of 16,445 square feet, and 90% of this requirement equals 14,613 square feet. The actual area of the lot, according to your measurements, is 14,836 square feet, which is 223 square feet larger than the minimum lot required in the event that you applied the yardstick under Section 11.7-4. The authorized variation is for the use of the lot and we must take into consideration the definition of the word "use" as defined in Section 3.2 of the ordinance, which reads as follows:

"The 'use' of property is the purpose or activity for which the land or building thereon is designed, arranged or intended or for which it is occupied or maintained and shall include any manner of performance of such activity with respect to the performance standards of this comprehensive amendment."

The hardship of the applicant in meeting the provisions of the ordinance without this variation is the prohibition of the use desired solely because of the insufficient area of the lot. The request is in nowise based on a variation of floor area ratio as defined in Section 3.2 and specified in Section 8.5-6 pertaining to the B6-6 Zoning. We advised you in our opinion of November 19, 1962, that the Board has no power to increase computations of floor area ratio in residential districts, but the foreclosure here under the ordinance, as you state, is because and solely because of the insufficient area of the lot.

It is, therefore, our opinion that provided the requisite standards for this variation, as outlined in Section 11.7-3, are met by the applicant that you have the authority to grant the variation.

PARKING LOT USED BY ANOTHER PARTY

(Alderman, 36th—Ward—E. W. P.—February 3, 1964)

You have asked for an opinion as to whether a Special Use can be granted on the premises at 7181-83 W. Armitage Avenue, which has an area of about 9,000 square feet, fronting 75 feet on Armitage Avenue, with a depth of 125 feet to an alley at the rear, 16 feet in width. This property is zoned B4-1 and under the present zoning ordinance, Section 8.3-4 B.(27), (p. 26A of the Chicago Zoning Ordinance), a parking lot is a permitted use without being attained as a Special Use through the Board of Appeals-Zoning.

The question as to this particular property arises from the fact that the owner, Joseph B. Caracci, proposes to have said parking space used by Mont Clare Savings & Loan Association, which is located at 1920 N. Harlem Avenue, in the city of Elmwood Park, a block away from the subject property. Under the ordinance and zoning classification, as we have stated, said property could be used as a parking lot by the owner. It is our opinion that as the ordinance is now worded the owner has the right to use said lot for a parking lot complying, of course, with all ordinances pertaining to its construction and regulation. The fact that the owner plans to let the parking lot be used by the bank, which is in another municipality, does not in our opinion change the right of the owner to use said premises as a parking lot.

We note from the file in the application before the Zoning Board of Appeals, Cal. No. 21-64 S, that there have been a number of nearby property owners who have objected to the use of this property as a parking lot. They state in their petition that they believe the Special Use is not necessary for the public convenience at the proposed location. As to this, the owner, as we see it, has the right under the B4 classification to use the property without any of the requirements precedent to a Special Use.

The objectors state that an increase in traffic on a residential street in an R1 and R2 zoned area decreases the desirability of the neighboring property and affects its value. The subject property being zoned in a B4-1 district many building uses could be erected thereon. The fact that the owner is giving the auto parking space to an individual or institution for private cars is the right of a property owner to find an income use for his property.

For these reasons we believe that there is no legal objection to the granting of the use by the Board of Appeals-Zoning.

EFFECT OF COURT DECREE

(Zoning Administrator—E. W. P.—April 1, 1964)

January 21, 1964 you advised us that the Tower Cabana Club located at 3209 W. Peterson Avenue had presented to you copy of a Court Decree entered in the Circuit Court of Cook County in 1954 to permit the erection of an existing Club primarily used for swimming and cabanas. The property is presently zoned partially for B2-1 Restricted Retail from Peterson to Thorndale along the North Shore Channel and east of Kedzie Avenue, and R2 Single Family Residential District, as outlined in the 1957 Ordinance, from Thorndale to Ardmore also along the Channel and east of Kedzie Avenue. At the time of the entry of the Order, the entire property was zoned for single family residence as that term was identified and explained under the 1942 Ordinance. That Ordinance was declared invalid as it applied to the subject property and on appeal the judgment was affirmed by the Supreme Court.

The Lessee, Tower Cabana Club, now wish to use a portion of the area between Peterson and Ardmore for double tennis courts, and a major portion of the entire area between Thorndale and Ardmore, running north and south between the 16-foot alley east of Kedzie Avenue and the North Shore Channel, for a Golf Driving Range consisting of twenty-four tee off pads, 10-feet wide with concrete strips of slab. Detailed plot plan furnished by Counsel for Cabana is attached hereto.

You attached to your letter the communication of Tower Cabana requesting a certificate or permit from the Building Department for the proposed uses. Since receiving your letter, we also are in receipt of two letters from the Lawyers for Cabana, Raymond, Mayer, Jenner & Block, through C. H. Hennessey, Jr. of Counsel, setting forth the reasons for their opinion that Cabana is entitled to the certificate or permit under the Decree entered in September of 1954, and enclosing the plot plan attached hereto, relating to the proposed Golf Driving Range. So that your file may be complete, we are also enclosing copy of the two letters from Counsel for Cabana dated March 17, 1964 and March 24, 1964, and copy of the Opinion of the Supreme Court relating to the 1942 Ordinance and reported in 5 Ill. 2d 11.

Two principal questions are presented. First, does the City Council lack the power to zone property previously affected by a Decree of Court in a different manner than set forth in the Court Decree? Second, does the Applicant have the unquestioned right to add any recreational use, no matter how incompatible with the community, solely because it has a Decree permitting it to establish other recreational uses? It is our opinion that both of these questions must be answered in the affirmative in order that the Applicant may obtain a permit or certificate under the zoning ordinance as amended for the proposed Golf Driving Range.

The State Enabling Act grants to the City Council the right to zone all of the properties within the municipality and makes no exception as to any properties impressed with a Court decree. So long as the City adheres to the restrictions named in the Statute, it has the absolute right to zone all properties, even though existing properties thereon may be made non-conforming. Furthermore, the Decree entered here declared the *1954 Ordinance* invalid as it pertained to the subject property. True, the property was zoned for Single Family Residence use under the 1942 Ordinance and was so zoned in 1954 when the Court Decree invalidating that zoning was entered. It is also true that the portion desired for the Golf Driving Range is zoned for Single Family Residence use under the 1957 Ordinance. However, a comparison of the two Ordinances shows clearly that the 1957 Comprehensive Amendment differs materially from the concept of Single Family Residence zoning under the 1942 Amendment. The 1957 Comprehensive Amendment grants the owner of the property the right to use the premises for many uses aside from single family residence. Indeed, the present Ordinance specifies that the owner may use the property under certain conditions for a golf course. Section 7.3-1 reads as follows:

"

(6) Golf Courses, but not including commercially-operated driving ranges or miniature golf courses, provided that no clubhouse shall be located within 300 feet of any other property in a Residence District. . . ."

The late Judge Harry Fisher ruled in the *Franklin-Weber Motors Company, Inc.* case, No. 54-C-3902, that the City Council does have the power to zone properties that have been previously affected by a Court decree. In that case there had been a judgment invalidating the Single Family Residence District under the 1942 Ordinance, and another ordinance was passed continuing to place the property there in residential zone. Counsel for the plaintiff filed an amendment to its complaint urging that the officers of the City should be held in contempt of Court for zoning the property in a classification not granted in the decree and the Court ruled that the City had the

power to zone and that any action to be taken by the plaintiff would require a new Application for declaratory judgment under the rezoning ordinance.

The Applicant and its Counsel urge on the second question that the commercially operated driving range as outlined in the plot plan should be established because the language of the Supreme Court in the 1954 decision quoted the contents of Section 7 of the original Zoning Ordinance of 1923 as permitting "every use as golf or tennis courts or similar use . . .". We do not agree. A Golf Course and Golf Driving Range are two different uses so far as density is concerned. A Golf Course covers a considerable space of ground. Much of it is far removed from other uses, such as residences, while a Golf Driving Range, here proposed, is an intensive rapid-fire operation in close proximity with residential uses, day and night. It would consist of twenty-four approaches extending to the North Shore Channel from Kedzie Avenue, and from Thorndale to Ardmore and separated from the adjacent homes by a 16-foot alley. In addition, the intricate equipment in plain sight of the adjacent residences and the amount of traffic and great numbers of people not far removed from the back yards of the home owners would cause considerable congestion and a situation entirely incompatible with the adjoining residential uses. The owner of the property would be departing from the views expressed by the Illinois Supreme Court, should he establish this Golf Driving Range. The Illinois Supreme Court examined the records of the evidence in the 1954 case and based its opinion on that evidence and did not have before it any of the unfavorable elements that are prevalent with the proposed use on the subject premises. The physical evidence in the 1954 opinion of the Court, 5 Ill. 2d 11, is compact and readily draws the demarcation. The Court said on Page 16:

"Appellee, Tower Cabana Club, leased the subject property from the Sanitary District for a term of fifty years beginning on March 1, 1954. It proposes to construct on the property a large heated and filtered swimming pool, 100 by 40 feet in size, and two rows of two-story cabana buildings running north and south of either side of the pool containing about 150 cabanas. In addition there would be a wading pool for small children, playground equipment, a snack shop and a shelter for use during inclement weather. It is proposed that one of the cabanas contain a beauty shop. The grounds would be completely landscaped with appropriate walks, lawns and flower gardens. Southernmost would be the parking area with ample facilities for off-street parking for members and guests. Access to this area would be through Ardmore and Kedzie. The plans show no entrance off Peterson Avenue. The entire enterprise would be operated as a private club. Memberships would be sold for a fixed amount to some 150 members and the facilities would be available to them and their families and from three to five guests per week each. Operation during night hours and the winter months is not planned. The cost of the entire project would be about \$250,000. . ."

We are of the opinion that the City acted within the scope of its power in rezoning this property under the Comprehensive Amendment of 1957. We are further of the opinion that the proposed use of a Golf Driving Range is incompatible to the uses allowed by the Court decree of 1954 as interpreted in the Supreme Court opinion. The application for certificate or permit for the Golf Driving Range should be denied. With reference to the application for the Tennis Courts to be located on the northerly portion of the property, it is our opinion that this use should be granted. There is nothing incompatible with this use for Tennis Courts in the area designated.

DIVISION OF LOTS

(Chairman, Board of Appeals—E. W. P.—April 21, 1964)

We have your letter of April 6, 1964 in which you attached copy of a survey covering a piece of property located at the above address, reference to which an application for variation was filed with you on September 26, 1963 to modify a partially constructed four apartment structure into five apartments, the purpose being to add one additional apartment to be located at the lower level of the structure. You also attached a photograph.

You advise that at the time of the hearing you were without authority to act because even with the 10% allowance which you might make the lot area would be short of the required number of square feet under the ordinance. The area is zoned R3 General Residence and 87th Street is a section line street. The original lot area was only 7333 square feet. You therefore held the matter in abeyance and under advisement because the Applicant was negotiating for the purchase of additional adjacent property measuring 9 by 11 feet, as shown by the survey, which 99 square feet gives a total of 7432 square feet which would suffice with your allowance of 10% from the 8250 square feet required.

You request our opinion as to whether or not by attaching this 9 by 11 foot patch the Applicant has satisfied the terms of the ordinance. The applicable provision is contained in Section 5.7-2 of the Ordinance entitled "Division of Zoning Lots" which reads as follows:

"No improved zoning lot shall hereafter be divided into two or more zoning lots and no portion of any improved zoning lot shall be sold, unless all improved zoning lots resulting from each such division or sale shall conform with all the applicable bulk regulations of the zoning district in which the property is located. However, with respect to the resubdivision of improved zoning lots in the R3 District, side yard requirements shall not apply between attached buildings."

Looking at the survey there does not seem to be any utility for the parcel of property 9 x 11 feet which has been added to the subject lot. However, the fact remains that the parties hereto have satisfied the requirement as set forth in Section 5.7-2 of the Ordinance, and the terms of the Ordinance are complied with and the application should be granted.

REHEARING BY BOARD OF APPEALS

(Chairman, Board of Appeals—E. W. P.—April 22, 1964)

We have before us your letter of April 14, 1964 referring to resolution authorizing the Zoning Administrator to issue a certificate of occupancy for a billiard hall and the serving of soft drinks in a three-story brick building, on premises at 1526 W. 21st Street, *upon condition that all applicable ordinances of the City of Chicago shall be complied with before the certificate of occupancy is issued.*

You advise in your letter that the testimony at the hearings indicated that the prior use of the property was for a printing establishment and that it was the determination of the Board that the billiard parlor should be permitted to occupy the premises as a successor use. You have now learned through the Building Department that the use for a printing shop was not

continuous and that apparently the only use since a fire in 1961, which caused the printing establishment to cease operations, was for the storage of equipment needed to repair the fire damage in the building which would seem to indicate that the building was vacant and unoccupied during a period of over one year. You also advise that this three-story building in which the store is located has a long list of housing violations on file in the Department of Buildings.

You request our opinion as to whether the additional facts which were not introduced at the hearings and which had they been introduced would have resulted in a denial of the appeal, would permit you to revoke the resolution adopted on March 10, 1964 and deny the appeal at this time. You state that the license bureau of the City is holding up the issuance of the license.

Section 17 of Article 2 of the Zoning Ordinance provides as follows:

"(17) Nothing contained in The Chicago Zoning Ordinance shall be deemed to be a consent, license or permit to use any property or to locate, construct or maintain any building, structure or facility or to carry on any trade, industry, occupation or activity.

The provisions in The Chicago Zoning Ordinance are cumulative and additional limitations upon all other laws and ordinances, heretofore passed or which may be passed hereafter, governing any subject matter in The Chicago Zoning Ordinance."

Section 11.3-4 provides that all decisions of the Board of Appeals are final administrative determinations subject to review by court as by law may be provided. Our office wrote an opinion under date of September 28, 1925, Volume 14, Page 340, setting forth reasoning and the law prohibiting rehearings of the Board. This opinion was based on the 1923 Zoning Ordinance, but the situation has not changed with the subsequent passage of the 1942 and 1957 Ordinances.

However, in view of Section 17 of Article 2 and failure of the Applicant to meet the condition precedent, that all applicable ordinances of the City of Chicago must be complied with before the certificate of occupancy may be issued, both the license and the certificate of occupancy should be denied.

CONSIDERATION OF EQUITIES

(Chairman, Zoning Board of Appeals—E. W. P.—July 22, 1964)

We have your letter dated July 16, 1964 in which you advise that you have had several hearings on the above case on appeal based upon two notices sent to the appellant by the Zoning Administrator's Office, as follows:

Notice of June 13, 1963: "Restore illegally erected partitions forming bedrooms and restore building to proper number of efficiency apartments as indicated on original plan and permit No. 291302 issued on December 9, 1960 or submit revised plans indicating proper number of apartments for available parking spaces, to comply with Sections 7.12-2 and 43-10."

Notice of July 12, 1963: "Restore premises from 21 apartments to 12 apartments and 9 efficiency apartments as same is in violation of zoned district R-4 of the City of Chicago Zoning Ordinance. (Article 7.5-4)."

You state that the original permit, dated December 9, 1960, was issued to allow the construction of a three-story brick building with 12 dwelling

units and 9 efficiency units, in accordance with the plans presented to the Building Department at that time. The building was then completed before February of 1963 at which time it was purchased by the present owner as a 21 dwelling unit apartment building. He could find no complaints nor any violation of the City ordinances in the construction of the property and claims to be an innocent purchaser.

The lot, 16,000 square feet in area, can provide 12 dwelling units, plus 9 efficiency units under the ordinance, but is short about 2900 square feet of area required for 21 dwelling units and to that extent the building is non-conforming and illegal. The 10% variation which you are empowered to grant, 1600 square feet, would not accommodate the ordinance for 21 dwelling units which would still be short 1300 square feet. In addition thereto, 4 additional parking spaces would be required under the ordinance for the number of units now included in the building and it appears that the area is not available for these additional parking spaces.

You advise that the building as it now stands, consisting of all dwelling units, reflects more favorably upon this high grade residential community than a building with efficiency units. You request our opinion as to whether or not there is a solution under the ordinance to solve this problem.

You further urge us to bear in mind that you are informed there are a large number of instances of this kind, many of which will likely reach you in due course, so that our opinion will include a major policy issue with reference to a situation such as this.

One of the landmark cases in zoning dealt largely with this problem—the case of *Welton v. Hamilton*, 344 Ill. at page 82. There a *certiorari* action was filed, similar to the action now under administrative review by adjoining residents. The Commissioner of Buildings of the City of Chicago in the *Welton* case had disapproved an application for a permit to erect a 20-story apartment building at 36-42 E. Oak Street, Chicago, Illinois, because the building proposed to be built did not conform to the requirements of the zoning ordinance. The Board resolved that the ordinance be varied so that the applicant would have a right to the construction of the building according to the plans. In the matter now pending before the Board, in order to sustain the position of the appellee, the Board would have to decide that the building already constructed is authorized even though it deviates from the ordinance. The Court in the *Welton* case said:

“The board of appeals is not a court but an administrative board which has no judicial powers and the hearing before it is not a judicial proceeding. It has no legislative powers and its only authority is in connection with the execution of the law. If a tribunal transcends the limits which the constitution or the law has prescribed for it and assumes to act where it has no jurisdiction its acts will be utterly void.”

In the *Welton v. 40 East Oak St. Bldg. Corporation*, 70 F. (2d) 377, and in a companion case on the same property decided in the U. S. Supreme Court, it was held that the building at 40 E. Oak St., which was fully completed, should be partially demolished so as to conform to the ordinance. The Court said: “The surest way to stop the erection of buildings in defiance of zoning ordinances is to remove all possibility of gain to those who build illegally.” Later, a compromise was reached with the adjoining property owners whereby the Oak St. owners had to pay heavy damages and the building was permitted to remain.

It is our opinion that the appeal before you should be dismissed and the matter should be adjusted by the chancellor in the court proceedings where it is also pending. The chancellor could consider equities in view of the contention of the applicant here that it is an innocent purchaser. The court did also say in the *Welton* case in 70 F. 2d 377, at page 381, that it

was in accord with the argument of the appellee that the court should balance equities and that the effect of the relief on appellees, if innocent purchasers for value, must be considered as well as the wishes of the appellants. This consideration, however, cannot be given by the Board of Appeals but rests exclusively with the chancellor in equity proceedings.

CONTINUATION OF NON-CONFORMING USE

(Zoning Administrator, Department of Buildings—E. W. P.—September 22, 1964)

August 7, 1964 a Food Purveyor and Milk Retail (Combined License) was issued to Lita Zegarella, 1759 W. Cullerton Street, Chicago, Illinois. Subsequent thereto, on August 19, 1964 you advised the City Collector's Office that the application had been disapproved by the Department because of violation of zoned District R-4 of the Chicago Zoning Ordinance (Art. 7.3-4).

We have before us an expired license, No. 6276, issued July 26, 1961 in the name of Stanley and Sophie Golonka, 1759 W. Cullerton Street, Chicago, Illinois, for the same use as Food Purveyor-Milk Distributor store. This license would expire as of January 1, 1962 in the event that it had not been renewed. We have no information as to whether or not it was renewed for the year 1962. However, the store had been in existence for many years and at the time that the present license was applied for there was on the premises the counters, shelving and large cooler, which is necessary for the use of the store for Food Purveyor-Milk Distributor store.

Sec. 6.4-5 of the ordinance provides that when a legal nonconforming use is discontinued and the structure or portion thereof remains unoccupied or is not used for a continued period of one year, that it shall not be occupied or used except by a use which conforms to the use regulations of the district in which it is located. Sec. 6.4-7, however, provides for the substitution of one non-conforming use for another if it is the same use which occupied the building or structure or for a use permitted in a more restrictive district, and then adds that the permission of the non-conforming use shall not modify the provision for amortization as provided in subsection 6.4-8.

It is our opinion, based on the data that we have before us which is the official record of the office of the City Collector, that the owner or occupant of the premises has the legal right to continue the use as authorized under the former license, No. 6276, as a Food Purveyor-Milk Retail (Combined License) and that the application should be approved as for zoning and that the license issued August 7, 1964, No. 5471, to Lita Zegarella should be restored to her. The said party has also, on the basis of the license issued, made considerable investment for the use that the store was, and is still, constructed and intended. The two sections of the zoning ordinance cited when read together form the basis for the restoration of the license. In *Brown v. Gerhardt*, 5 Ill. 2d 106, the Court held:

"Time in itself, is not an essential element of change or abandonment of a lawful nonconforming use, but is entitled to consideration in connection with other facts evidencing an intention to change or abandon."

CONTINUATION OF NON-CONFORMING USE

(Alderman, 36th Ward—E. W. P.—October 27, 1964)

We are writing this letter in response to your request in connection with the application that you advise will be made for a permit for a restaurant, including the use of a service of liquor in connection thereto, at 6019 W. Fullerton Avenue by Angelo Scaccio. You requested our opinion as to whether or not this use could be established as it pertains to zoning at this address. You advise that there is no local objection to this use and that you believe in view of the circumstances that the application should be approved. You understand, of course, that a final determination cannot be made until the application is processed and a decision reached as to whether or not the applicant qualifies for a liquor license.

According to the data that you furnished us, the premises are now being used and have been for some period of time as a restaurant only. Prior to that time a restaurant and service of liquor had both been established there. The fixtures for use for the service of liquor have remained on the premises over the years, but the use for liquor was discontinued in the present operation as a restaurant. Both of these uses are nonconforming inasmuch as the location is zoned R-3.

Your representative has furnished us with eleven photographs showing the exterior and interior of the premises. The exterior, of course, shows the business uses and the interior in the photographs contains the equipment for the restaurant and also the facilities for the bar. Across the street from the premises is the Sinclair Oil Station and an Electric Company. The applicant contends that because a legal nonconforming use was established for the service of liquor in connection with the restaurant use for years, even though the tenants on the premises had discontinued the said use for several years, that now they should be permitted as a matter of right to re-establish it.

The facts control in each specific instance. In the leading case in Illinois, *Addison Brown et al., Appellants, v. Paul Gerhardt, Jr., et al., Appellees*, 5 Ill. 2d 106, the Court had under consideration the question of the continuance of a nonconforming use which had been discontinued for seven years. The Court in that case held that where there was never any intention to change or abandon the use on the part of the owner of the premises, although it had not been continuously so occupied, that he was entitled in that case to continue the use. The Court said, at pages 110 and 111:

"The term 'to change' is practically synonymous with 'to discontinue' and 'to abandon' when used in this connection. It must first be determined from the record whether the nonconforming use was changed or merely suspended. . . . Time in itself is not an essential element of change or abandonment. It is entitled to consideration, particularly in connection with other facts evidencing an intention to change or abandon . . ."

From the data that you have submitted it is our opinion that the facts related would fall within the purview of the ruling in the *Brown v. Gerhardt* case. When the proper application for the use has been presented in accordance with the provisions of the Code, all of these matters will be more fully developed.

ADVERTISING DEFINED FOR ZONING PURPOSES

(Zoning Administrator—E. W. P.—May 13, 1965)

We have your letter of May 7, 1965 relating to application for proposed signs to be erected on the roof of the premises of Federated Distributors, Inc., d.b.a. South Shore Liquors and Old Rose Distributing Company, at 2834 South Lock Street, Chicago, Illinois, approximately 370 feet from the Dan Ryan Expressway, located in an M2-3 Zoning District. The context of the signs as proposed is contained in Exhibits D and E attached to the letter of Counsel for the applicant and affidavit attached thereto, which depicts a pictorial illustration and lettering as follows:

Exhibit D—J & B RARE SCOTCH WHISKEY

PENNIES MORE IN COST

WORLDS APART IN QUALITY

and

Exhibit E—Illustrated bottle and lettering—

SEAGRAM'S

THE SURE ONE

The question to be resolved is whether or not the signs as illustrated constitute an advertising sign, prohibited by Article 10, Paragraph 10.14, subparagraph 4, of the Chicago Zoning Ordinance, or a business sign which is permissive. To resolve this question there must be an interpretation of the definitions of Advertising Signs and Business Signs as defined in Article 3, Section 3.2, which definitions read as follows:

Sign, Advertising. An "advertising sign" is a sign which directs attention to a business, commodity, service, or entertainment conducted, sold, or offered elsewhere than upon the premises where such sign is located, or to which it is affixed.

Sign, Business. A "business sign" is a sign which directs attention to a business or profession conducted or to a commodity, service, or entertainment sold or offered upon the premises where such sign is located, or to which it is affixed.

The proposed sign does not direct attention to Federated Distributors, Inc. or South Shore Liquors or Old Rose Distributing Company, but does direct attention to brands of liquor which are commodities sold upon the premises where such sign is located. Does the fact that these commodities are sold at the subject location remove it from the category of an advertising sign and place it within the purview of a business sign? The answer in our opinion must be in the negative—for the definition of an advertising sign contains the important element that an advertising sign embraces commodities that are sold or offered elsewhere than upon the premises where such sign is located, and it is common knowledge that the two brands of liquor designated are sold universally and the proposed signs advertise products generally sold elsewhere as well as on the premises. Even though the sign also contained the name of the business, in our opinion it is prohibited because it would constitute an advertising sign in a composite arrangement of business name and specific brand or brands of liquor. We do not believe any doubt exists, but even if this were so we must interpret

the provision of the ordinance in the light of the yardstick set forth in Section 5-1 (2), as follows:

"Where the conditions imposed by any provision of this comprehensive amendment upon the use of land or buildings or upon the bulk of buildings are either more restrictive or less restrictive than comparable conditions imposed by any other provision of this comprehensive amendment or of any other law, ordinance, resolution, rule or regulation of any kind, the regulations which are more restrictive (or which impose higher standards or requirements) shall govern."

It is therefore our opinion that your Department is correct in your analysis that the proposed signs would constitute advertising signs under the ordinance. We are returning herewith the site plan and affidavit of Mr. Arthur Edelstein, President of the Company. We are retaining the photostatic copy of the letter from Simon, Teitelbaum & Wolfberg.

INTENT AND PURPOSE OF ZONING ORDINANCE

(Commissioner of Buildings—E. W. P.—June 30, 1965)

Reference is made to your letter requesting our opinion as to whether or not you should process an application and issue a permit for the erection of a two-apartment building, at the above address, in an R3 Zoning District which was disapproved for the reason that the lot of record is less than 3,750 square feet. You state that the lot has a depth of 100 feet by 30 feet, comprising 3,000 square feet, and that this situation prevails in the other adjacent and parallel lots on the south side of Haft Street between Milwaukee Avenue and Nagle Avenue. Further, you advise that on either side of the subject vacant lot is a two-story building, both built previous to the enactment of the present Zoning code and that the entire south side of the street between Nagle and Milwaukee is improved, except the property at the subject address.

The particular section of the Zoning Ordinance, Section 7.5 (2), makes the provision that in an R3 District on an unimproved lot of record, a 2-family dwelling may be established if the gross lot area is at least 3,750 square feet, and were this provision to be applied in the present instance, we would have a situation where we would require the owner to build a single family residence only on a lot in an R3 District which would be surrounded by two two-story buildings in the same block, both built on the equivalent area of the subject lot, viz: 3,000 square feet. This is an old subdivision laid out originally in lots of record of 3,000 square feet, except one corner lot at Haft Street and Nagle Avenue. In this same block, which is between Nagle and Milwaukee on Haft Street, there is a large multiple building with stores on the first floor and a garage at the corner of Milwaukee Avenue and Haft Street.

The intent and purpose of the Zoning Ordinance provides in Article 2, subsection (3), that the Ordinance was to be enacted to protect the character and maintain the stability of a residential area; and also in subsection (13) to conserve the taxable value of land and buildings throughout the City. The Illinois Supreme Court was faced with a similar problem in the case of *Marquette National Bank v. County of Cook* (1962), 182 N. E. 2 147, where the County required a minimum lot area of 20,000 square feet in an area that customarily required 10,000 square feet. The Court in declaring the law invalid stated:

"... When it is shown that no reasonable basis of public welfare requires limitation or restriction in zoning and resulting loss, the ordinance fails, and presumption of its validity is dissipated. . . ."

It is our opinion that in this particular instance the application for permit may be processed and the permit issue, provided the applicant meets all of the other requirements of the Municipal Code.

BOARD OF EDUCATION EXEMPT

*(Director, Bureau of Architecture, Board of Education—E. W. P.—
July 15, 1965)*

We have your letter advising that The Chicago Board of Education has prepared plans for the above mentioned school building and has presented these plans to the Chicago Building Department with an application for a Building Permit. The permit was refused because the site is located in an area which has been zoned, in part, as residential (R-3) and as commercial (C1-1). You further state that the building is needed in the neighborhood and that the Board of Education has no other site available for this purpose. The Sanborn map shows a Public School previously established at this address.

You request our opinion as to whether or not a permit may be issued for the school building, regardless of the provisions of the zoning ordinance. The Board of Education of the City of Chicago is a public body politic and corporate under the provisions of Chap. 122, Art. 34 of the Revised Statutes of the State of Illinois and the Board is vested with the power to erect, purchase and locate free schools and necessary facilities. Article 34-17 provides that no power vested in the Board or any of its officers, agents, or employees shall be exercised by the City Council of the City of Chicago. It is also established that where a municipality is exercising a judgment or discretion, its action is judicial and not ministerial. A body politic and corporate acts judicial in exercising discretion when it selects the site and adopts a plan in the making of public improvements (*City of Chicago v. Seben*, 165 Ill. 371).

It is our opinion that the selection of the subject site and approval of plans by the Board of Education was the performance of a governmental function within the express powers of the Board, and that the zoning ordinance has no application thereto. It is our further opinion that the necessary permits should be issued by the Commissioner of Buildings in the construction of the school, without regard to the provisions of the zoning ordinance. We are transmitting copy of this letter to Hon. John P. Maloney, Zoning Administrator, together with a letter to him confirming our position.

SHOPPING CENTER IN RESIDENTIAL DISTRICT

(Zoning Administrator—E. W. P.—August 30, 1965)

We acknowledge receipt of your letter of August 26, 1965, in which you enclosed a letter from Mr. J. Alton Lauren, a realtor located at 53 West Jackson Boulevard, in which he seeks permission to erect a shopping center at the subject address and requests permission to build stores for the following purposes:

- Grocery supermarket
- McDonald's restaurant
- Drug store
- Liquor store
- Department store

Mr. Lauren in his letter states that the eastern half of the property is zoned M2-2, and the western half is zoned C1 and that the most satisfactory arrangement for placing the buildings on the property would be to put the stores on the eastern half zoned M2-2 and face the stores into the parking area, and backing up to Whipple Street. If the buildings constituting that part of the shopping center were placed on the subject property which is zoned for C1 use, there could be no objection whatsoever for the shopping center is a permitted use in a C1 District. However, the arrangement would not be orderly or compatible and conducive to any efficiency. The entire tract is a single integrated piece of property under common ownership. From a standpoint of sound zoning, the choice of the owner to place the shopping center in that part of the property zoned M2-1, rather than in that part of the property zoned C1, should govern.

This area was, until recently, occupied by the Pilsen Brewing Company and the Pilsen Park Summer Garden. There are many old structures still on the property and quite a number of the stock buildings and cooling buildings have been demolished but the debris is still on the property. In its present condition it constitutes a very undesirable picture and is one of the properties in Chicago that we should be expeditious in the improvement thereof in accordance with the intent and purpose in Article 2 of the Chicago Zoning Ordinance.

Reference to Article 10 dealing with Manufacturing uses, and particularly Section 10.3-2 relating to M2-1 to M2-5 General Manufacturing Districts, discloses that permitted uses include drug stores; food stores; restaurants, including the sale of liquor in conjunction therewith; warehousing, taverns, and accessory uses. The Manufacturing uses are governed specifically by Performance Standards, requiring that all business servicing or processing shall take place within completely enclosed buildings.

The immediate area surrounding consisting of the many residences is entirely lacking of a center for shopping and probably would welcome the uses contemplated by the Applicant. September 27, 1962, we wrote an opinion in a similar circumstance relating to establishing a large one-story brick retail department store on premises located at S. Columbus Avenue, between Rockwell St. and California Ave. and Chicago Belt Railway Right-of-Way. We believe that there are many elements present in that letter that are consistent with the use as desired at the present address and we are attaching copy of that opinion, which you will recall developed an area in the best interest of the City.

It is therefore our considered opinion that the application should be processed and the permits issued for these uses as well as the zoning certificate of occupancy and the Applicant be permitted to proceed with the construction and use as proposed, provided all other regulations are met. We are returning herewith the original letter of Mr. Lauren and the plot plan which he enclosed.

HEIGHT RESTRICTION NEAR AIRPORT

(President, Cook County Board—J. E. S.—December 20, 1965)

We respectfully advise that we are in receipt of a copy of the above cited matter transmitted by the Federal Aviation Agency regarding a request by Allied Asphalt Paving Company for permission to erect an asphalt plant North of Higgins Road and West of Mt. Prospect Road in the vicinity of Chicago-O'Hare International Airport. This department has been advised that said asphalt plant is located in an unincorporated area in Cook County with a present zoning of M2 General Manufacturing District.

Though the Cook County Zoning Ordinance allows an asphalt plant as a permitted use in an M2 zoning classification, said Ordinance also provides for height restrictions in the vicinity of airports. Being that the subject site is approximately 700 feet southwesterly of the boundary of O'Hare Airport, the maximum allowable height of construction would be approximately 25 feet above curb level.

The subject proposal has also been reviewed in relation to the Chicago-O'Hare International Airport Zoning Regulations. The subject site is located at the southerly edge of the Approach Zone of runway 14L-32R, in the Transition Zone of runway 14L-32R, and also in the Inner Horizontal Zone. Inasmuch as the present grade of the subject site is 665 feet Above Mean Sea Level, and applying the related provisions of Section 10.4 of the O'Hare Regulations, the maximum allowable height of structure which may be constructed would be approximately 48 feet Above Grade Level, or approximately 713 feet Above Mean Sea Level.

The City of Chicago, therefore, under the foregoing circumstances, enters this, its objection, to any application which may be filed in relation to the proposed construction.

Section C. FRONTAGE CONSENTS

FRONTAGE CONSENTS APPLICABLE TO MEAT PACKING HOUSE

(Acting Commissioner of Buildings—E. W. P.—March 24, 1964)

We have your letter dated March 10, 1964, in which you ask our opinion on the following matter: Does the construction of a building as a nut packing house fall within the provisions of Section 40-5 relating to frontage consents? You state that the building will use machinery for nut-cracking, such as sorters, shellers and shakers. You advise that the operation will use 38 pieces of machinery ranging in weight from 500 pounds to 3,800 pounds; there will normally be about ten people employed; and the trucking and loading facilities will be on Mozart Avenue.

You state further that the traffic will consist of four delivery trucks daily, and one semi-trailer every ten days. A 7 or 8 hour day is regularly followed, but three or four months out of the year there is a holiday business which requires 15 hours per day. You state that the structure will be in a brick building with a 12-foot ceiling and a concrete floor, with a frontage of 58 feet on Montrose Avenue and extending back 85 feet on Mozart Avenue.

You advise that the Applicant is now operating at 1075 W. Harrison Street, which is within the project area for the new Congress Center site of the University of Illinois and that the Department of Urban Renewal has served notice that the company must relocate no later than June 1, 1964.

Mr. Arthur H. Kvale, Investigator, assigned to our office, inspected the operation of the business at 1073-75 W. Harrison Street and also the physical surroundings of the subject property at 2835-37 W. Montrose Avenue. We are attaching a copy of the report made by Mr. Kvale which indicates that the operation of this business creates a considerable amount of noise and would be in the immediate proximity of residential uses at the proposed site.

Section 40-5 reads as follows:

"No person shall locate or construct on any lot fronting on any street or alley in any block in which one-half of the buildings on both

sides of the street are used exclusively for residence purposes, or within fifty feet of any such street, any building, structure or place used for the following purposes, without the written consent of a majority of the property owners according to frontage on both sides of such street or alley:

... manufacturing establishments using machinery or emitting offensive ... noises ..."

It is our opinion, based on the investigation and the information given in your letter, that the Applicant would require Frontage Consents under Section 40-5. We furthermore doubt very seriously that the Applicant could meet the Performance Standards in this area.

CONSTITUTIONALITY OF FRONTAGE CONSENT

(Acting Commissioner of Buildings—E. W. P.—June 23, 1964)

With reference to the above application for permit for construction of office and storage warehouse building, Map 18-1 at page 184B shows the subject location on the north side of 77th Street, between Kedzie and Sacramento in an M1-1 District on the fringe of a large segment of M2-2 zoned area to the immediate north including the right-of-way of the Belt Railroad.

Across the street on the south side of 77th Street from Troy Street to Whipple Street are many new single family residences located in a triangular-shaped R2 zoned district. To the west of Troy and the residences and on the east side of Kedzie Avenue is a restaurant located in a B4-1 zoned area with a large parking area between the residential and business uses. To the immediate south and southeast of the R2 district is a large M1-1 area with the huge spread of tracks and operations of the Wabash Railroad.

We are advised that the plans for the construction of the office and storage warehouse building have been approved by the various divisions of your department, but a final approval has been refused on the ground that Section 102-3 of the Code requires frontage consents. The attorney for the applicant takes the position that under the holding of the Supreme Court in the case of *Drovers Trust & Savings Bank v. City of Chicago*, 18 Ill. 2d 478, Section 102-3 of the Code is invalid in view of the fact that the City Council has zoned the property in question for manufacturing use which permits use for an office and storage warehouse building.

The City does not agree that all frontage consent ordinances are invalid in view of the *Drovers* case which considered the consent cases as they pertained to gasoline stations. However, it is our considered opinion that in view of the physical surroundings of the subject property and the property zoned R2 across the street, that frontage consents should not be required for this construction. The uses present in the area in the *Drovers* case were described therein and must be given weight in that Supreme Court decision.

In an M district dwelling units which would be compatible with the new dwellings across the street from the subject property are prohibited, and any of the uses allowed in the M Zoning commencing with auto laundries and ending with taverns would be more objectionable than the proposed use. Further, the surrounding railroad uses and other business uses in varying degree present traffic and safety hazards more than those attending the operation of the office and warehouse here proposed (*Wolford v. City of Chicago*, 9 Ill. 2d 613).

Other controlling factors considered in rendering this opinion are the safeguards set forth in the ordinance contained in the performance standards,

Sections 10.5 through 10.10-11-1 and the regulations contained in Section 10.13-1 along Residence District Boundaries. These latter regulations particularly protect the owners of the residential properties across the street and we assume that your inspection and the plans fully abide with these regulations and that adequate set-backs and landscaping are provided.

It is therefore our opinion that provided all requisites of the zoning ordinance are complied with the permit should be issued for this proposed construction without requiring frontage consents.

CHAPTER VIII—PUBLIC UTILITIES

Section A. RAILROADS

EASEMENTS

(*Bureau of Engineering, Department of Public Works—H. S.—March 3, 1961*)

This is to acknowledge receipt of your request for an opinion as to whether or not the City should bear the expense of relocating tracks on the right-of-way of the Chicago, Milwaukee, St. Paul and Pacific Railroad at Wellington Avenue and other locations, if any, where relocation of tracks of said railroad were required during the construction of said Sewer System.

You also transmitted prints of the construction work and a copy of an old ordinance passed sometime in 1881, whereby the railroad and its predecessors were granted rights to maintain tracks in certain streets in the town of Lake View, which is now part of Chicago.

Inasmuch as the railroads were given an easement only to pass over the City streets and do not own the right-of-way thereon, it is our opinion that the City is not obliged to pay for any expense incurred by the railroad for temporary relocation of tracks and equipment appurtenant thereto occasioned by the sewer construction.

Our opinion is based on the decision rendered in the case of *Peoples Gas Light & Coke Company v. City of Chicago*, 413 Ill. Page 457, which clearly sets forth the law regarding the obligations of the utility or other user of any public street to pay the expense of temporary removal or relocation in order to accommodate necessary sewer or other street repairs or improvements.

CONTRIBUTION FOR REPAIR OF "RIGHT OF WAY"

(*Commissioner of Public Works—H. H. P. & S. R. D.—March 7, 1961*)

We have your letter dated February 28, 1961, in which you request an opinion as to whether the Gulf, Mobile and Ohio Railroad can be made to contribute to the cost of repairing the viaduct over its right of way on S. Pulaski Road between 35th and 43rd Streets.

In *City of Chicago v. C. & N. W. Ry. Co.*, 4 Ill. 2d 307 (1954) it was held by the Supreme Court of Illinois that the Illinois Commerce Commission under section 58 (paragraph 3) of the Illinois Public Utilities Act (Ill. Rev. Stat., 1959, chap. 111½, par. 62) has exclusive jurisdiction over reconstruction of viaducts over railroads and that it can fix the apportionment of the cost of such reconstruction between the railroad and the City.

Section 58 (paragraph 3) provides:

"The Commission shall also have power by its order to require the reconstruction, alteration, relocation or improvement of any crossing

(including the necessary highway approaches thereto) of any railroad across any highway or public road, whether such crossing be at grade or by overhead structure or by subway, whenever the Commission finds after a hearing that such reconstruction, alteration, relocation or improvement is necessary to preserve or promote the safety of the public or of the employees or passengers of such railroad. By its original order or supplemental orders in such case, the commission may direct such reconstruction, alteration, relocation or improvement to be made in such manner and upon such terms and conditions as may be reasonable and necessary and *may apportion the cost of such reconstruction, alteration, relocation or improvement between the railroad company or companies and other public utilities affected, or between such company and companies and other public utilities and the . . . municipality, or other public authority in interest. The cost to be so apportioned shall include the cost of changes or alterations in the equipment of other public utilities affected as well as the cost of the relocation, diversion or establishment of any public highway, made necessary by such reconstruction, alteration, relocation or improvement of said crossing.*" (Emphasis added.)

We are of the opinion that the cost of repairing the viaduct comes within the provisions of the above quoted section of the statute. Upon your request, we will file with the Illinois Commerce Commission a petition to have this matter determined.

SWITCH TRACK'S EXPENSE

(Commissioner of Public Works—J. J. D.—May 4, 1961)

Your letter of April 26, 1961, together with the attached Agreement, was referred to the writer for reply. You request that you be advised whether or not the Agreement with Chicago and North Western Railway Company for track to Filtration Plant meets with our approval as to form and legality.

In compliance with your request, we submit the following:

1. Section 9 of the proposed agreement provides that "the Railway Company shall have the right to use said track, or any extension thereof, for any and all purposes which do not reasonably interfere with service to the Industry". This should be more clearly defined. Does it represent preferred service for the City, or service subject to use by other customers of the Railroad when such use in the opinion of the Railroad does not reasonably interfere with service to the City?

2. Under the Agreement, the City assumes the entire expense of maintenance of that portion of the track extending from a point lettered "Y" to a point lettered "Z", as shown on plat made a part of the Agreement. This section constitutes practically the entire extent of the proposed track. Inasmuch as the Railroad reserves to itself the right to use the track "for any and all purposes", exempt only reasonable interference with service to the Filtration Plant, the City should not be required to assume this expense.

In the case of *Alton R. Co. v. Illinois Commerce Commission, ex rel.*, 368 Ill. 584, our state Supreme Court held "that switch tracks of this type once built become a part of the line of the railroad, whether built upon private rights of way or upon public streets" and the railroad, . . . "may use the track or extensions thereto, conveniently to serve other shippers and the public at large". The Court, in this opinion, sustained an order of the Illinois Commerce Commission requiring the railroad to maintain the side track in question.

3. Section 4-Changes and Additions, Section 10-Indemnity Clause,

Section 11-General Indemnity, Section 12-End of Clearance, Section 19-Indemnity re Modified Standard Clearance, and provision concerning cost of installation and maintenance of "no clearance" and other signs, are all directly connected with the use of said track.

Considering the fact that the Agreement provides for joint use of said track by the Railroad Company and the City, it is our opinion that the maintenance of said track and the liability represented by the above sections should not constitute a responsibility to be assumed by the City.

"PIGGYBACK" OPERATION AS SPECIAL USE

(City Council—A. H.—June 16, 1961)

On June 14, 1961, the Supreme Court reversed the judgment of the trial court, which, in turn, had affirmed the decision of the Zoning Board of Appeals of the City of Chicago, in an administrative review. The effect of the Court's order is to permit a railroad "piggyback" operation in the Rockwell Street Yard located in the 13th Ward.

The decision of the Zoning Board of Appeals was threefold: it denied plaintiffs' appeal from the decision of the Zoning Administrator, who refused to grant a building permit to erect a small building to be used in conjunction with its proposed "piggyback" operation; it denied plaintiffs' application for a special use for construction of the "piggyback" facilities; and it denied plaintiffs' alternative argument that they had the right to institute the operation as an extension of their presently existing legal special use.

Plaintiffs are the owners and lessees of the Rockwell Street Yard, which is an area bounded by West 74th Street on the north, South Rockwell Street on the east, approximately West 75th Street on the south and South Kedzie Avenue on the west. It is used primarily by the Chesapeake & Ohio Railroad, as a switching and classification yard. The Chesapeake & Ohio Railroad sought to provide facilities for a "piggyback" service in the Yard. This service involves the transference of truck trailers from the motor vehicle tractor to specially built railroad flat cars for long distance hauling to other cities in the East and conversely the receipt of the trailers in the Yard for transference to tractors, with destinations in the City of Chicago.

The Supreme Court held that although the proposed "piggyback" operation is an innovation, it cannot be said that it changes the present character and design of the Yard; and that the installation and operation of the proposed facilities will be an integral part and continuation of the nature and purpose of the existing classification and switching Yard. The Court also held that since the vacant tract of land upon which the railroad intended to install the "piggyback" facilities has been a part of the Rockwell Street Yard over the years, the tract and yard would be treated as an entirety; therefore, if the use made of the yard was a legal special use, it extended to the tract as well. The court concluded that the Zoning Board of Appeals of Chicago should have authorized the issuance of a permit to construct the building requested and should have entered a decision permitting the construction and operation of the remaining "piggyback" facilities as a legal existing special use.

We are attaching a copy of the Court's opinion.

RAILROAD BARRICADES

(Commissioner of Streets and Sanitation—M. M. M.—April 4, 1963)

Your memorandum of January 29, 1963 advising us that the Chicago, Rock Island and Pacific Railroad has requested the City to allow them to place barricades across Holland Road at the railroad grade crossing of their tracks north of 91st Street, requests an opinion on the following questions:

1. Is the Chicago, Rock Island and Pacific Railroad required by ordinance to construct a grade separation over Holland Road, North of 91st Street?

2. Who is responsible for constructing the pavement under the Chicago and Western Indiana grade separation of Holland Road?

3. Does the City have the authority to grant the railroads request to barricade Holland Road? If so, does this office have the authority? If this office does not have the authority to grant such a request, what procedure is necessary?

4. Would barricading Holland Road, north of the Chicago and Western Indiana right-of-way and south of the Rock Island right-of-way and turning off the protective flasher lights be construed as a change in the crossing and protective equipment? If so, would the request have to be referred to the Illinois Commerce Commission?

5. If the crossing were barricaded for some time would the future status as a crossing be prejudiced before the Illinois Commerce Commission?

6. If barricades were placed, maintained and lighted by the Rock Island Railroad, would the City be liable in event of an accident?

7. Would barricading of Holland Road, as requested by the Rock Island Railroad render the City liable for damages under suit of denial of access or egress?

Holland Road runs north and south intersecting the track of the Rock Island Railroad approximately one-half block north of 91st Street at grade level. The Road then continues north approximately 50 feet at a sloping angle where it passes under the overpass for the tracks of The Chicago and Western Indiana Railroad. These Railroads cross Holland Road one-half block west of the Dan Ryan Expressway. Holland Road is a dedicated city street. Nevertheless, on the records of the Engineering Department of the Department of Streets, it is shown as an unimproved street and there is no record of it ever having been paved by the City.

Both Railroads were required to elevate their tracks over Holland Road under the track elevation ordinance of 1908 (Section 4, Pars. 9 and 14). The aforementioned ordinance required a grade separation to be constructed by each Railroad crossing Holland Road. This ordinance was passed prior to the enactment of the Public Utilities Act, which statute, when enacted, withdrew the power of the City of act over grade separations and the City could neither pass new nor enforce existing ordinances on these matters. Upon inspection of the Rock Island Railroad crossing, it was found that the crossing is at grade level and not elevated as provided in the 1908 ordinance; whereas, the tracks for the Chicago and Western Indiana Railroad are elevated and a subway constructed beneath them.

The authority to grant the Rock Island's request to abolish the grade crossing on Holland Road is vested in the Illinois Commerce Commission by reason of Ch. 111½, section 62 (Ill. Rev. Stats. 1962), which states, in part :

"The commission shall also have power after hearing to alter or abolish any grade crossing, heretofore or hereinafter established, when in its opinion the public safety requires such alteration or abolishing. and, except in cities, villages and incorporated towns of five hundred thousand (500,000) or more inhabitants, to vacate and close that part of the highway on such grade crossing altered or abolished and cause barricades to be erected on such highway in such manner as to prevent the use of such grade crossing as a highway when in the opinion of the commission the public convenience served by the crossing in question is not such as to justify the retention thereof."

The Illinois Commerce Commission, in the exercise of its power to regulate grade crossings in the interest of public safety, possesses a wide discretion and may determine what public interest requires and also what means are necessary for the protection and promotion of these interests. The aforementioned rule was clearly brought forth in the case of *Illinois Commerce Commission v. New York Central Railway* (1947), 398 Ill. 11, 75 N. E. 2d 411. The Supreme Court has also decided that the Illinois Commerce Commission's jurisdiction over all phases of grade crossings is plenary and exclusive (*City of Chicago v. Illinois Commerce Commission, In the Matter of ex rel. Chicago and WIR Co.* (1934), 356 Ill. 501, 190 N. E. 846).

While having the authority over the railroad crossings on public highways in cities of 500,000 or more inhabitants, the Illinois Commerce Commission has no authority to vacate and close a highway. Only where there has been an abandonment vacation of a highway as prescribed by statute does the Illinois Commerce Commission have the power to discontinue railroad crossings thereon (*Chicago and Eastern Indiana Railroad Company v. Road District No. 10* (1933), 353 Ill. 160, 187 N. E. 155).

In our opinion, therefore, the law of the State of Illinois requires a hearing by the Illinois Commerce Commission before a grade crossing may be abolished and should this grade crossing be in a city of five hundred thousand (500,000) or more inhabitants then, prior to its abolishing, the highway or street which crosses the railroad must be properly vacated as prescribed by statute. After the vacation, a hearing before the Illinois Commerce Commission in order to abolish the grade crossing must find that the retention of the crossing is not warranted by public convenience. Considered by the Commission in a proceeding for abolishment of a grade crossing are: the location of the crossing, surrounding conditions and volume of traffic (*City of Chicago v. Illinois Com. Com. ex rel. Chicago and Eastern Indiana Railway Company* (1934), 356 Ill. 501, 190 N. E. 846). This places the burden on the Railroad petitioning for permission to discontinue the grade crossing to show by the preponderance of the evidence that it is entitled to such relief (*Chicago and Eastern Indiana Ry. Co. v. Road District No. 10* (1933), 353 Ill. 160, 187 N. E. 155).

In answer to your specific questions, we are of the opinion that:

- 1) The Rock Island and Pacific Railroad is not required by ordinance to construct a grade separation over Holland Road, north of 91st Street;
- 2) the Illinois Commerce Commission, upon petition of an interested party will conduct a hearing to determine who is responsible for constructing the pavement under the Chicago and Western Indiana grade separation of Holland Road;
- 3) the City does not have the authority to grant the Rock Island Railroad's request to barricade Holland Road; in order to barricade Holland Road, it would be necessary that the City vacate the street crossing the railroad and then the Illinois Commerce Commission grant the Rock Island Railroad's petition for closing the grade crossing;
- 4) the barricading of Holland Road north of the Chicago and Western Indiana's right-of-way and south of the Rock Island right-of-way and turning

off the protective flasher lights would be construed as a change in the crossing and protective equipment, and, as such, would have to be referred to the Illinois Commerce Commission for approval;

5) if the crossing were vacated and barricaded as outlined above, the City of Chicago would not be prejudiced insofar as opening up the grade crossing at some future time by a hearing before the Illinois Commerce Commission;

6) if the City vacated this street at the railroad crossing, and the Illinois Commerce Commission allowed the Rock Island Railroad to barricade the grade crossing and if barricades were placed, maintained and lighted by the Rock Island Railroad, the City of Chicago would not be liable in the event of an accident;

7) if the City of Chicago properly vacated the street at the railroad crossing and the Illinois Commerce Commission granted the Rock Island Railroad's request to barricade the grade crossing, the City of Chicago would not be liable for damages under a suit of denial of access or egress.

RAILROAD SUBLEASING

(Alderman, 44th Ward—J. C. M.—October 19, 1964)

This is in response to your communication of September 29, 1964, addressed to the Corporation Counsel, concerning the right and legality of the use of Lakewood Avenue between Barry Avenue and George Street, by the Chicago, Milwaukee and St. Paul Railroad Company.

Under dates of March 15, 1922; May 31, 1924; and February 7, 1927, this office rendered opinions for another street concerning same ordinance granted to the Chicago and Evanston Railroad Company to lay tracks, etc.

"See page 633 of Hoover on Special Ordinances setting forth:

'An ordinance concerning the Chicago & Evanston Railroad Company (Passed and approved October 3, 1881; accepted September 20, 1882).'

"Section 1 of the ordinance cited above provides as follows:

'That permission and authority be and are hereby granted to the Chicago and Evanston Railroad Company, *to lay down, maintain and operate a single railroad track or double tracks, with the necessary switches and turnouts, through the town of Lake View, on a route commencing at a point to be selected by said company in Fullerton Avenue on the south line of the town, between the east line of Southport avenue and a point six hundred (600) feet east thereof, and running thence north-easterly and north to a point on the north boundary line of the town, three hundred and thirty (330) feet east of the center of Evanston avenue; and in the course of said route to run in the street which runs from Wrightwood avenue to Lincoln avenue on the line midway between Southport avenue and Racine road (or avenue), and in Stella street from Grace Street (or Ivanhoe street), its present southern end, to the street known as Sulzer street (or Armadale road), its present northern end; and to cross all streets and alleys in said route.'*"

That part of Lakewood Avenue (formerly Herndon street) is contained in that part of the railroad's right italicized in the above quoted ordinance. The records of the Bureau of Maps and Plats, Town of Lake View, page 76, indicate that the only right of the railroad and its successors, the Chicago,

Milwaukee and St. Paul Railroad Company, is a license to use Lakewood Avenue for railroad tracks.

In our opinion, *they do not have the right to sublease any part of this street not used by railroad tracks*; furthermore, we feel that trucks parked overnight in this street are subject to Police regulations and ordinances governing same.

Copies of the various opinions rendered by the Corporation Counsel's office are attached to this memorandum. These opinions apply to all the streets in the aforementioned ordinance.

ENFORCEABILITY OF MAINTENANCE AGREEMENT

(Commissioner of Streets and Sanitation—E. B.—November 8, 1965)

Referring to your letter of October 22, 1965, originated by Mr. John J. Kelly, Deputy Commissioner for Bureau of Electricity, requesting an opinion as to (1) City's authority to require railroads to improve the lighting of viaducts to levels required for present day safety and welfare of pedestrians and of vehicular traffic and (2) if so, what action is available to enforce such requirement, we beg to advise as follows:

In the case of *City of Chicago v. The Illinois Commerce Commission*, 356 Ill. 501 the Supreme Court of this State in deciding against the enforceability of an ordinance passed by the City Council requiring The Chicago and Western Indiana Railroad Company to elevate its tracks and to provide for underpasses at certain places where it intersected streets, in its opinion said:

"The power to require railroads to elevate their tracks and to alter or abolish grade crossings, prior to January 1, 1914, when the original Public Utilities Act became effective, resided in cities as a part of their police power"

and held that this police power was not inherent in municipal corporations but belongs to and emanates from the State, which through its General Assembly, as it had a right to do, withdrew the same and delegated such powers, among others, to the Commerce Commission, another agency of government. It accordingly held that when the Public Utilities Act came into force on January 1, 1914, the power of the City over grade separation ceased to exist, and thereafter it could neither pass new nor enforce existing ordinances with reference to matters within the exclusive jurisdiction of the Commission;

In the case of *City of Chicago v. Chicago and North Western Railway Company*, 4 Ill. 2nd 307 which was a Declaratory Judgment action brought to test the enforceability of a contract between the City and said Railroad made in December, 1906, under which the railroad undertook to replace a viaduct upon a certain happening which occurred after January 1, 1914, cited the above case and followed its reasoning, holding said contract was not enforceable in an action at law;

However we believe and are hopeful that the Illinois Commerce Commission can and will give consideration to such a contract obligation in apportioning the cost of any grade separation structure approved or ordered by it to be built and maintained.

Accordingly we are of the opinion that the obligations of the railroads, to light underpasses, whether by contract or by provisions of an ordinance, are unenforceable in a court of law but should receive consideration in a proceeding before the Illinois Commerce Commission in apportioning between the parties, the cost of such lighting.

Having answered the questions presented by your said letter, may we make the following suggestions concerning your efforts to obtain as much participation as possible by the railroads in the payment of the cost of providing and maintaining electric lighting in underpasses provided for in previous City ordinances:

1. That you seek to obtain by a new contract, performance by those railroads which have been and are now complying with the provisions of an ordinance or contract placing the obligation of lighting underpasses on such railroads, before any proceedings, before the Illinois Commerce Commission are instituted.

2. That only after all efforts made under No. 1 above are exhausted, proceedings before the Illinois Commerce Commission be brought, where the need for adequate lighting may be established and the cost thereof apportioned between the railroad and the City.

To implement suggestion number 1 above, we have prepared and are enclosing herein the following:

1. A form of letter to be sent to the railroads referred to in No. 1.
2. A form of agreement to be used as a guide with such railroads as desire to cooperate and comply with your request for the execution of a new contract.

RAILROAD CROSSINGS

(*Commissioner of Streets and Sanitation—E. R.—November 22, 1966*)

Referring to your communication of May 18, 1966 you requested that the legal department advise you as to the course of action to be taken in regard to the above captioned matter. You averred in your letter that the Railroad's obligation arose under certain City ordinances requiring all Railroads which cross at grade, to provide suitable lighting at such locations.

The Illinois Commerce Commission has exclusive jurisdiction over the character of protection at railroad crossings in municipalities; *Hyland v. Chicago & North Western Ry. Co.*, 262 Ill. App. 427 (1937). The Illinois Supreme Court has held that city ordinances of the nature as described above, are unenforceable; *City of Chicago v. Chicago and North Western Ry. Co.*, 4 Ill. 2d 307 (1954).

Therefore, it is the opinion of the writer that Chicago and Western Indiana Railroad Company is under no obligation to pay for the rental of street lighting lamps at eleven (11) of its railroad grade crossing locations within the City of Chicago.

Accordingly, the following warrants, and those subsequently issued to the Chicago and Western Indiana Railroad Company for this particular purpose, should be cancelled:

D 99034	D 98768
D 98007	D 99290
D 98474	D 98007

Section B. CHICAGO TRANSIT AUTHORITY

NEW BUS OPERATION

(Chairman, Committee on Transportation—E. V. H.—January 20, 1961)

Your letter of September 16, 1960, relating to a communication from Chicago Bus Transport Service, Inc., has been referred to this office.

Therewith you transmitted the enclosed draft ordinance authorizing an exclusive franchise to the said company for the establishment of a "closed door" express shuttle bus service between the Loop area and the Lake Front Exposition Hall (McCormick Place). You ask whether under existing ordinances the authority for such franchise is within the purview of the committee.

Following the receipt of your letter, an additional copy of the proposed ordinance was obtained from the applicant for submission to the Chicago Transit Authority. We have not yet been advised of their position in this matter.

Section 311, of Chapter 111½ of the Illinois Revised Statutes, grants the metropolitan transit authority the right to use streets within a municipality for local transportation of passengers upon the authorization to do so by an ordinance of such municipality.

An ordinance of April 23, 1945 (C. J., p. 3368), authorizes the Chicago Transit Authority to use designated city streets for such local transportation of passengers. Furthermore, section 4 thereof authorizes and permits the CTA in addition to its passenger equipment to provide and operate chartered cars and vehicles for the transportation of persons . . .". Finally, section 330 of the aforesaid ch. 111½ grants the board of the CTA authority to change and extend its routings.

Because of the extensive listing of city streets over which the CTA was authorized to operate by the aforesaid ordinance of April 23, 1945, and since the proposed ordinance does not designate any specific routings contemplated by the applicant, its operations would probably be along streets over which the CTA has been given the right to operate by the aforesaid ordinance.

Accordingly, it is our opinion that it is not within the purview of the City Council under existing ordinances to grant an exclusive franchise of the type proposed by this applicant without the express consent or waiver of objection thereto by the CTA.

In the latter eventuality there would arise certain questions as to the form and substance of the proposed ordinance. We do not express an opinion regarding these matters.

NO EXEMPTION FROM DRIVEWAY FEE

(Commissioner of Streets and Sanitation—A. F. G.—February 27, 1961)

Your letter of February 17, 1961 is as follows:

"We would appreciate it very much if your good office would render an opinion as to whether or not we can legally collect driveway fees, for existing driveways on property owned by Chicago Transit Authority.

Each year we send to City Comptroller's Office warrants for collection, which remain open on their books.

These warrants will either have to be cancelled or put through for collection."

In two opinions of this office, both published in full in Vol. 23 of the Opinions of the Corporation Counsel, at pages 734 and 735, it was held that Sections 33-14 to 33-22, both inclusive (the driveway ordinance), were applicable to the Chicago Transit Authority.

Since those opinions were written, Section 33-18 of the driveway ordinance has been amended exempting from the payment of the annual maintenance fee, driveways now or hereafter maintained at any place used exclusively "for charitable, educational or residential purposes." In failing to include in the driveways, exempt from the payment of the annual maintenance fee, driveways used by the Chicago Transit Authority, the city council clearly indicated it did not intend to exempt such driveways from the payment of the fee.

It is our opinion that the driveways referred to in your letter are subject to the payment of the fee and you should take steps to enforce their payment.

REIMBURSEMENT PROPOSAL

(Chief Engineer, Department of Public Works—J. J. D.—September 25, 1961)

Your letter of September 14, 1961, requesting an opinion as to form and legality of a proposed agreement between the City of Chicago and the Chicago Transit Authority generally described in the above caption, was referred to the writer for reply. You also request an opinion concerning the proper depository of payments made to the City, as provided by said agreement for moneys advanced by the City to the Authority for the cost of transportation equipment furnished and installed by the City in the West Side Subway Extension. We shall reply in the order of the written requests, as contained in your letter.

We find two objections to the form of the proposed agreement.

1. As submitted, the agreement requires the signature of the Mayor and City Clerk. The ordinance provides that the "amounts . . . shall be determined by agreement between the grantee and the Commissioner of Subways and Superhighways".

2. The section providing that "if the actual cost of said transportation equipment so furnished and installed is more or less than said amount of

\$11,745,963; or, the average useful life of said transportation equipment is more or less than 31.66 years, then the amount and time of said monthly payments shall be adjusted accordingly".

Both of these items are important factors in the ultimate consummation of the agreement.

Considering the possibility of a bona fide difference of opinion concerning the amount of payments to be made and the life tenure of the property involved, it is our opinion that a definite provision should be made in the agreement for an effective disposition of such difference of opinion. The agreement, as submitted, lacks any provision governing this contingency.

As to your request for an opinion concerning the proper depository of funds paid by the Authority to the City under the provisions of the agreement referred to, Section 9, Paragraph E, of the ordinance passed April 23, 1945, covering the above subject matter specifically provides:

"Amounts sufficient to amortize the initial depreciated cost of said transportation equipment to be paid monthly by the grantee to the City under the provisions of this paragraph shall be determined by agreement between the grantee and the *Commissioner of Subways and Superhighways* and all payments so made to the City shall be deposited by the Comptroller in the City Transit Fund."

We have found no amendment to this section of the ordinance.

It is our opinion, under the conditions set forth in your letter, that funds paid by the Authority to the City should be deposited by the Comptroller in the City Transit Fund.

In view of the above, we are withholding our approval of the agreement and draft of ordinance submitted therewith pending the submission of a revised form of said agreement.

We are returning herewith the enclosures received with your letter.

REDUCED FARES FOR SENIOR CITIZENS

*(Executive Director, Mayor's Commission for Senior Citizens—
E. B.—June 4, 1963)*

Pursuant to your letter of May 27, 1963, asking for an opinion as to whether reduced fares for senior citizens could be authorized by:

- (a) The CTA Board.
- (b) The City Council by ordinance.
- (c) The General Assembly of the State of Illinois.

We have examined the law with reference thereto and beg to advise as follows:

The CTA (Chicago Transit Authority) was organized pursuant to an Act of the Legislature known as the Metropolitan Transit Authority Act, Sections 301-344, approved April 12, 1945, Chap. 111½, Ill. Rev. Stat. 1959, which provides in part as follows:

(Section 330) "The Board shall fix rates, fares and charges for transportation, provided that they shall be at all times sufficient in the aggregate to provide revenues (a) for the payment of the interest on

and principal of all bonds, certificates and other obligations payable from said revenues and to meet all other charges upon such revenues as provided by any trust agreement executed by the Authority in connection with the issuance of bonds or certificates under this Act, (b) for the payment of all operating costs including all charges which may be incurred pursuant to Sections 29 and 39 of this Act and all other costs and charges incidental to the operation of the transportation system, (c) for the payment of all costs and charges incurred pursuant to Section 37 and 38 of this Act and any other costs and charges for acquisition, installation, construction or for replacement or reconstruction of equipment, structures or rights of way not financed through issuance of bonds or certificates under Section 12 of this Act, and (d) for any compensation required to be paid to any municipality for the use of streets, subways and other public ways. The Board may provide free transportation within any municipality in and by which they are employed for firemen and public health nurses, when in uniform, and policemen when in uniform or, when not in uniform, upon presentation of identification as policemen, and may provide free transportation for employees of the Authority when in uniform or upon presentation of identification as such employees, and may enter into agreements with the United States Post Office Department for the transportation of mail, and the payment of compensation to the Authority in lieu of fares for the transportation of letter carriers, when in uniform at all times".

and pursuant to said statute the City Council of the City of Chicago passed an ordinance on April 23, 1945 approved by the Mayor April 30, 1945, granting the CTA the "exclusive right and authority to acquire by purchase, condemnation, lease, gift or otherwise and to establish, construct, reconstruct, maintain and operate in, over, across, along, under and upon the streets, alleys, public ways and public grounds within the city, a transportation system for local transportation of passengers within the city of Chicago herein called Transit System, the major portion of which system is to be located within or the major portion of the service of which system is to be supplied to the inhabitants of the city of Chicago, and which system is to be used mainly for the transportation of persons for hire in the city and in adjacent and suburban territory within the metropolitan area," with certain limitations not applicable to the question at hand.

Section 17, paragraph A provides:

"The Grantee shall establish and publish a schedule of the rates and charges for all the services to be performed by the Grantee which rates and charges when published or as modified from time to time by the Transit Board, shall include the rates to be charged and the transfer rights to be accorded for the transportation of persons over the lines and routes of the Transit System for a continuous ride within the city",

subject also to certain limitations not now involved.

In the case of *People v. Chicago Transit Authority*, 392 Illinois 77 upholding the constitutionality of the Act of the Legislature under which the CTA was formed, in passing on Section 330 of said Act authorizing the CTA to fix rates, fares and charges for transportation, the rates to be limited to an amount which will produce certain items of expenses there enumerated, was held constitutional, the court saying:

"Under that section the Board may not put into effect charges or rates which would result in the accumulation of a surplus over the items there referred to".

You will note that under said Section 330 it is expressly provided that the Board may provide free transportation within any municipality to certain people therein enumerated and to make agreements with the

U. S. Post Office service for payment of compensation to the authority in lieu of fares for the transportation of letter carriers, etc. In view of these limitations it may be questionable as to whether the CTA could provide free transportation or limited charges of transportation to others than those specified in the Act.

Furthermore we are advised that the Trust Indenture entered into by the CTA for its bond issues specifically provides, in order to secure the bondholders, for limitation of fare reductions unless the provisions of said indenture are complied with.

The City Council of the City of Chicago is bound by the contract ordinance referred to with the CTA, giving the latter the exclusive right to operate a transportation system within the City of Chicago, and therefore is powerless to affect any changes in the rates without the consent of the CTA.

The State Legislature, however, which created the CTA, of course having the power to create, has the power to modify such creation and could by an Act of the General Assembly place such burden as it may deem fit upon the CTA.

To answer your three questions specifically it is our opinion that:

- (a) The CTA Board is limited to its power both under the Act of the Legislature creating it and under the Trust Indenture under which bonds are issued to affect a reduction in fares or transportation charges to certain classes of individuals.
- (b) The City Council is bound by the contract ordinance with the CTA not to interfere with its right and power to fix rates and charges for transportation.
- (c) The General Assembly of the State of Illinois does have the power to impose restrictions or burdens upon its creation, in this case, the CTA.

INFRINGEMENT ON C. T. A.'S FRANCHISE

*(Director, Mayor's Office of Inquiry and Information—M. M. M.—
January 15, 1965)*

Your memo of November 20, 1964 requesting an opinion whether the free bus service on Lincoln Avenue between Montrose and Belmont, rendered by the merchants of the Lincoln-Belmont-Ashland Shopping District is legal has been referred to the writer for reply.

A preliminary investigation of this operation indicates that four yellow colored school buses operate at half hour intervals picking up and discharging passengers on Lincoln Avenue from Montrose to Belmont, each Saturday from 11 a.m. to 5 p.m. It appears that at least one and possibly all of these buses are owned by the Cook County Bus Company, Inc., 3040 South Busse, Elk Grove Village, Illinois.

It is the opinion of this office that such a bus service is an infringement upon the exclusive rights granted to the Chicago Transit Authority to operate a transportation system for local transportation of passengers within the City of Chicago. This exclusive right was granted to the Chicago Transit Authority by Section 2, paragraph A of the Chicago Transit Authority Ordinance and Exhibit A which is a part thereof.

Exhibit A specifically states that the Chicago Transit Authority shall have use of North Lincoln Avenue from North Kedzie Avenue to North

Sedgwick Street; therefore, this bus operating on Lincoln Avenue between Montrose and Belmont is a violation of the C. T. A. Ordinance and an infringement upon the rights granted to the C. T. A. It is possible for the City to seek a permanent injunction in the Circuit Court of Cook County against the bus operation.

This bus service would also require a public passenger vehicle license as set forth in Chapter 28-2 in the municipal code of Chicago, more specifically set forth as follows:

"28-2. It is unlawful for any person other than a metropolitan transit authority or public utility to operate a motor vehicle, or for the registered owner thereof to permit it to be operated, for the transportation of passengers for hire within the city, except on a funeral trip, unless it is licensed by the city as a public passenger vehicle." [Passed Coun. J. 12-20-51, p. 1596; amend. 1-30-52, p. 1921; 12-30-52, p. 3905; 8-24-59, p. 782.]

Persons violating this section of the municipal code are subject to a penalty as set forth in Chapter 28-32.

We trust this is the information desired so that you might resolve this matter with both parties involved.

C. T. A. LIABILITY FOR MAINTENANCE

(Acting City Comptroller—M. M. M.—March 1, 1965)

Your letter of January 11, 1965 in which you requested an opinion of the Corporation Counsel as to the legality of certain charges made by the City of Chicago against the Chicago Transit Authority, has been referred to the writer for reply.

The charges which your letter concerned were:

- (a) repair, maintenance, reconstruction and operation of the Lake Street and Wells Street Bridges.
- (b) annual driveway permit fees.

We are writing a separate opinion on the annual driveway permit fees since you may wish to forward a copy to the department originating these charges.

Transmitted with your letter of January 11, 1965 were:

- (1) letter of December 30, 1964 from P. J. Menardi, Manager of Finance, to Mathias M. Mattern, Assistant Corporation Counsel.
- (2) legal memorandum of January 16, 1952 to P. J. Menardi from Thomas C. Strachan, Jr., General Attorney for the Chicago Transit Authority.
- (3) memorandum of September 28, 1951 from Thomas C. Strachan, Jr. to Mr. William McKenna stating the position of the Law Department of the Chicago Transit Authority regarding the claims of the City of Chicago for the repairs to the Lake and Wells Street Bridges.

Currently the warrants for collections for repair and reconstruction of the Lake and Wells Street Bridges are being prepared in the Department of Public Works, Bridge Division. In preparing these warrants the De-

partment of Public Works cites specifically the agreements executed between the Chicago Rapid Transit System and the City of Chicago on December 20, 1922 (Wells Street) and December 31, 1923 (Lake Street). The amounts shown on the warrants are based on a charge of $\frac{1}{3}$ total cost of maintenance, repair and reconstruction of the respective bridges excluding the cost of sub-planking, paving of roadway, sidewalks, rails, lights and signal bridge protection.

Warrants for collection on operations of the bridge are prepared by the Department of the Port of Chicago generally on a one-third cost allocation of heat, light, etc. excluding the salaries of bridge operators. These warrants also specifically cite the agreements between the Chicago Rapid Transit System and the City of Chicago executed in 1922 and 1923.

THE ORDINANCE OF APRIL 23, 1945.

The grant to Chicago Transit Authority by the ordinance passed on April 23, 1945 reads as follows (par. A. sec. 3) :

"* * * consent, permission and the exclusive right and authority to acquire by purchase, condemnation, lease, gift or otherwise and to establish, construct, reconstruct, maintain and operate in, over, across, along, under and upon the streets, alleys, public ways and public grounds within the city, a transportation system for local transportation of passengers within the city of Chicago herein called Transit System.
* * *

1. to the extent set forth in Exhibit A and in Exhibit B. * * *"
Exhibit B reads as follows:

"Extensions, additions, improvements, equipment and facilities which the Grantee is to undertake to construct, reconstruct or acquire and install subject to compliance with all the terms, conditions and provisions set forth in this ordinance. * * *

ITEM I—RAPID TRANSIT SYSTEM IF ACQUIRED BY GRANTEE. * * *

Repair or reconstruct steel work and foundations of the existing elevated structures, rails and decks to bring them to a normal condition of maintenance. * * *

Section I of the ordinance defines the terms "transit system" and "transportation system" as follows:

"*Transit System or Transportation System* is defined to be all plant, equipment, property and rights owned or operated by the Grantee under the provisions of this ordinance and which are used or useful for the transportation of passengers for hire and which may include, without limiting the generality of the foregoing, street railways and railroads, elevated railroads, subways and underground railroads, motor vehicles, trolley busses, motor busses and any combination thereof." Section 15 of the ordinance is in part as follows:

"The Grantee shall maintain, repair and replace all parts of the Transit System to such an extent and in such manner that the Transit System at all times shall be in satisfactory condition for furnishing safe, comfortable and convenient service. * * *"

The provisions of Section 15 of the ordinance and the portions of Exhibit B above quoted are separate and distinct and form no part of section 18 and the language used therein is clear and explicit to the effect that it refers to the maintenance, repairs and replacements and fixes the liability of the Chicago Transit Authority to bear the expense of the same.

We do not believe that the Chicago Transit Authority can deny that the upper decks of the Lake and Wells Street Bridges are part of the transit system as defined in Exhibit B of the Ordinance of April 23, 1945. This being established, then Section 15 of the ordinance requires the Chicago Transit Authority to maintain the upper decks of the Lake and Wells Streets bridge.

The opinion dated September 18, 1951 rendered by the Law Department of the Chicago Transit Authority cites Section 18 of the Ordinance of April 23, 1945 as a justification for declining to pay to the City, the cost of maintenance, repairs, and reconstruction of the bridges. This opinion incorrectly relies on Section 18 of the Ordinance. Section 18 concerns itself with the compensation to be paid by the Authority to the City. The question here, is *not one of compensation but that of maintenance, repairs and replacement* as required by Section 15 and Exhibit B of the Ordinance of April 23, 1945. (Emphasis supplied).

The opinion dated January 16, 1952 rendered by the Law Department of the Chicago Transit Authority, although not specifically setting forth Section 18 of the Ordinance of April 23, 1945, uses the terminology contained therein. The opinion also confuses the grant of Authority, Section 2 of the Ordinance of April 23, 1945 with Section 18 (Compensation Section). The grant of authority does not grant the use of bridges or other publicly owned structures although this is mentioned in the Compensation Section.

We are therefore of the opinion that the Chicago Transit Authority is liable to the City of Chicago under Section 15 and Exhibit B of the Ordinance of April 23, 1945 for reimbursement of the cost for all maintenance, repairs and replacements of the upper decks of the two bridges and supporting structures therein including the repair or reconstruction of steel work of the existing upper structure, rails and decks to bring and keep the bridges in a normal condition of maintenance. The charge need not be limited to one-third of the total cost but should be reasonably apportioned.

It is our opinion that the liability of the Chicago Transit Authority does not arise as a result of any agreement entered into between the Chicago Rapid Transit Company and the City of Chicago since these agreements were discharged by release executed by the City of Chicago on September 29, 1947 and filed in the U. S. District Court as part of the Reorganization Proceedings of the Chicago Rapid Transit Company. We are also of the opinion that the City should not bill the Chicago Transit Authority for cost of operating these bridges since there is no provision in the Ordinance of April 23, 1945 for operating costs and agreement between the City of Chicago and the Chicago Rapid Transit Company under which the changes have been made is no longer enforceable.

In order that the Chicago Transit Authority be aware of the position of the City of Chicago, I would suggest that future warrants prepared by the Department of Public Works cite Section 15 and Exhibit B of the Ordinance of April 23, 1945 as the basis for the charge.

We are enclosing herewith, the three memorandums attached to your letter of January 11, 1965.

C. T. A. DRIVEWAY MAINTENANCE

(Acting City Comptroller—M. M. M.—March 3, 1965)

Your letter of January 11, 1965 in which you requested an opinion of the Corporation Counsel as to the legality of annual permit fees for maintenance of driveways being charged to the Chicago Transit Authority, has been referred to the writer for reply.

Currently, the Chicago Transit Authority is obtaining a driveway permit on the initial construction of driveways but is not paying the annual permit fee as provided in Chapter 33-18 of the Municipal Code of Chicago.

The City of Chicago derives its power to pass the driveway permit ordinance from Chapter 24, Section 11-30-2 and Chapter 24, Section 11-30-13 of the Illinois Revised Statutes.

11-30-2. Use of Streets.] § 11-80-2. The corporate authorities of each municipality may regulate the use of the streets and other municipal property.

11-30-13. Sidewalks.] § 11-80-13. The corporate authorities of each municipality may regulate the use of sidewalks, the construction, repair, and use of openings in sidewalks, and all vaults and structures thereon and thereunder, including telephone booths, and may require the owner or occupant of any premises to keep the sidewalks abutting the premises free from snow and other obstructions. As amended by act approved Aug. 5, 1963. L. 1963, P. . . ., H. B. No. 1615.

The power to regulate is a police power and the two above sections constitute the authority of the City Council of Chicago to pass Chapter 33-14 to 33-22 inclusive of the Municipal Code. The power to regulate confers the power to inspect and license (citations omitted). Only by inspection can proper regulation be provided. The authority of a municipality in the exercise of regulation, is limited to such a license charge as will bear some reasonable relation to the additional burdens imposed upon the municipality by the business or occupation licensed and the necessary expense involved in the police supervision. (Citations omitted).

The duties placed upon the Commissioner of Streets and Sanitation to administer the provision and requirements of the municipal code with respect to Chapter 33-14 to 33-22 inclusive, is an expense to the City of Chicago, and for such expense the City is entitled to make a necessary and reasonable charge for licensing. We submit that the initial license fee is proper and not unreasonable and it is necessary to cover the expenses of the administration as provided by the Code and since the City's business is contracted on a yearly basis, the annual fee for maintenance therefore is reasonable.

We are therefore of the opinion that in addition to the initial permit fee, the Chicago Transit Authority is liable for the annual permit fee for the maintenance of driveways since the City has the power to enact this Ordinance and there is no specific exemption for the Chicago Transit Authority in the Municipal Code.

AUTHORITY FOR CONSTRUCTION OF TRANSIT FACILITIES

(Commissioner of Public Works—R. F. S.—August 24, 1965)

Please refer to your request for a legal opinion as to the power of the City of Chicago and the C. T. A. to construct transit facilities at the Englewood rapid transit terminal.

Under the provisions of Chapter 111½, Sections 306 and 315, and Chapter 24, Sections 11-121-1 of the 1963 Illinois Revised Statutes, the Chicago Transit Authority and the City of Chicago have the power to construct any extensions and connections to the Chicago Subway System for use in connection with or collateral to the operation and maintenance of said subway.

The Chicago Transit Authority franchise ordinance passed by the City Council on April 23, 1945 and approved by the electors on June 4, 1945 is in accord with the above cited authority. Under the provisions of Section 19, paragraph C (5) (b) of said ordinance disbursements from the transit fund may be made "to construct or acquire any City owned transportation facility to be used in connection with the Transit System."

CITY TRANSIT FUND

(Commissioner of Public Works—R. F. S.—January 7, 1966)

Please refer to your request for a legal opinion as to the power of the City of Chicago and the C. T. A. to construct transit facilities at the Englewood rapid transit terminal.

Under the provisions of Chapter 111%, Sections 306 and 315, and Chapter 24, Sections 11-121-1, of the 1965 Illinois Revised Statutes, The Chicago Transit Authority and the City of Chicago have the power to construct any extensions and connections to the Chicago Subway System for use in connection with or collateral to the operation and maintenance of said subway. The Chicago Subway System includes, as set forth in Chapter 24, Section 11-121-1 of the 1965 Illinois Revised Statutes, "elevators, stations and other structures, equipment, appliances or appurtenant property appropriate to a system of such subways." This would specifically include the elevated, tracks and stations which are an integral part of the Chicago Subway System.

The Chicago Transit Authority franchise ordinance passed by the City Council on April 23, 1945 and approved by the electors on June 4, 1945 is in accord with the above cited authority. Under the provisions of Section 19, paragraph C (5) (b) of said ordinance disbursements from the transit fund may be made "to construct or acquire any City owned transportation facility to be used in connection with the Transit System." The said Ordinance gives the City Council the power to expend money for the stated purpose. These expenditures are at the discretion of the City Council as there is no mandatory requirement in the Ordinance which directs the City Council to expend funds from the "City Transit Fund" for the expansion of the facilities.

Pursuant to an ordinance passed April 23, 1945, the Chicago Transit Authority, a Municipal Corporation, was granted the authority and the exclusive right to acquire, construct, reconstruct, maintain and operate facilities for local transportation within the City of Chicago. In accordance with Chapter 24, Illinois Revised Statutes 1965, Sections 11-121-6, a municipality is granted the authority to lease or contract for the use of the Chicago Subway System to a public authority authorized to operate transportation facilities. This can be accomplished by ordinance of the City of Chicago on any terms and conditions that the City Council may designate. Therefore there are no requirements for the reimbursement to the City of Chicago for monies expended from the City Transit Fund for the acquisition and construction of the expansion of the Englewood Branch of the North-South Rapid Transit route.

To my knowledge there is no pending or threatened litigation of any kind concerning the project for the extension of the Englewood transit route.

CHAPTER IX—PUBLIC WAYS

Section A. DEDICATION AND VACATION

VACATION BASED ON PRIOR USE

(Acting Commissioner of Public Works—H. S.—July 17, 1963)

Please refer to your communication of June 6, 1963, regarding the above captioned matter wherein you requested a clarification of the status of a vacation of W. 44th Street and surrounding streets at the above captioned location, which vacation was effected by instrument recorded January 3, 1885 as Document No. 597177, said vacation having been declared invalid by the then Corporation Counsel under an opinion rendered February 17, 1914, and designated as Opinion No. 187.

We have given the matter careful consideration and find the following facts pertinent thereto:

On February 17, 1914 the then Corporation Counsel of Chicago, in answer to an inquiry from the Superintendent of Maps as to the validity of the above mentioned vacation, stated that such instrument was invalid and of no effect because of existing sewers and water mains in three of the streets surrounding the two blocks in question. The records, however, did not indicate that any such sewers or water mains existed in W. 44th Street.

The records also indicate that three buildings occupy parts of W. 44th Street, one of which extends across the full width of the street, and have been in existence for a considerable number of years.

The plat of Stone & Whitney's Subdivision of the West $\frac{1}{2}$ of the Southeast $\frac{1}{4}$ of Section 6, Township 38 North, Range 14, East of the Third Principal Meridian and other property was recorded on December 29, 1856 in Book 125 of Maps, page 62 as document No. 79695. By declaration dated December 29, 1884 and recorded January 3, 1885 as document No. 597177, Frank Alsip, the record owner of the West $\frac{1}{2}$ of the Northwest $\frac{1}{4}$ of the Southeast $\frac{1}{4}$ of Section 6, which embraced Blocks 2 and 3 in Stone & Whitney's Subdivision and 44th Street between said blocks, vacated said plat as to said premises pursuant to Section 7 of Chapter 109 of the Revised Statutes of Illinois.

No improvement of 44th Street has ever been made by the City of Chicago, although Wolcott Street on the East, 43rd Street on the North, and 46th Street on the South have been opened, used and maintained.

The foregoing mentioned opinion was predicated upon the theory that by the acceptance of 43rd Street, Wolcott Street and possibly Damen Avenue prior to the owner's vacation, hereinabove mentioned, the City likewise accepted 44th Street and also for the reason that there were sewer installations on all of said mentioned streets except there were no sewer installations nor utilities of any type in the portion of W. 44th Street in question.

There is presently one warehouse building extending completely across vacated 44th Street which is in possession of Lewis Paper Products Co., on property commonly known as 1919 W. 43rd Street. It would appear that a permit for the construction of said building issued on June 4, 1926 as No. A7011 (file No. 138243, Book 2-37, page 500), then described as 1915-17 West

43rd Street. There is a building immediately North of the tract now in question which improvement is located upon the North half of 44th Street and adjoining property; it is a one-story brick office and warehouse building commonly known as 4342 South Wolcott Street and that a permit issued for its construction on November 21, 1952 as No. 84545 (file No. 436904, Book 66, page 188).

There is a building which appears to occupy at least the South $\frac{1}{2}$ of vacated 44th Street owned by Curtis Products Co., commonly known as 4400 South Winchester, and is about 25 years old.

Acceptance, either by formal action of the municipal authorities or by maintenance or user is required even in the case of a statutory plat. In *Jordan v. City of Chicago*, 166 Ill. 530, the court said: "It may be conceded that a plat of a town, properly certified, acknowledged, and recorded as provided by statute, when accepted by the municipality, operates as a conveyance in fee of the streets and alleys contained in the plat. But there must be an acceptance."

In the 107 years since its dedication, 44th Street has never been opened or used as a public way and no utility company equipment has been installed therein. Nothing appears of record indicating a formal acceptance by the City. *Town of Lake v. LeBahn*, 120 Ill. 92, in holding for the municipality where acceptance was the issue, stated the following frequently cited statement of principle: "A municipality must be permitted to wait its *reasonable* time for opening and improving its public streets as its own resources and the public need will allow and require, without thereby rendering its streets subject to appropriation for the exclusive use and enjoyment of individuals." The test of reasonableness always depends upon the facts and circumstances in each case, but it would appear that 107 years should more than meet this test.

To the same effect was the decision in *Moore v. The City of Chicago*, 261 Ill. 56, where J. W. Cooper's Addition to the Town of Hyde Park was recorded in 1870 dedicating certain streets and the fact that the City had accepted 106th Street was conceded. 40 years later an owner's vacation was recorded and this suit followed. In holding that acceptance of 106th Street did not constitute acceptance of all of the streets in the subdivision, the court was required to rely entirely on non-acceptance without resort of the principle of estoppel by virtue of improvements on the property by an adjoining owner.

Other cases holding that acceptance of part of the streets does not constitute acceptance of all of the streets in a subdivision are: *City of Chicago v. Drexel*, 141 Ill. 109; *Jordan v. City of Chicago*, 166 Ill. 530; and *Gietl v. Smith*, 320 Ill. 467.

It appears that in the instant situation there are a number of circumstances from which the intention not to accept 44th Street may be inferred:

1. The issuance of building permits for the construction of buildings thereon.
2. The sufferance by the City, without objection, to the construction of such buildings.
3. The non-action by the City for a period of 107 years.

From the foregoing, we are of the opinion that the Opinion of February 17, 1914 was correct as far as the contiguous streets therein mentioned were concerned but was incorrect as to the part of 44th Street lying between Wolcott and Damen Avenues; that said vacation was good and valid as to that portion of W. 44th Street in question and that the owners of the premises abutting said street are the owners thereof and may convey, transfer or lease same or any portion thereof in the same manner that owners of real estate in fee simple may do.

DEDICATION AS PREREQUISITE FOR PAVING BY THE CITY

(Engineer of Local Roads and Streets—M. M. M.—November 1, 1965)

Your letter of October 19, 1965 to C. E. Defendorf, Chief Engineer of the Indiana Harbor Belt Railroad Company, with a copy to Walter E. Rasmus, Acting Chief Engineer, Bureau of Engineering for the City of Chicago, has been forwarded to the writer.

The Bureau of Engineering of the Department of Public Works of the City of Chicago will not be responsible for the paving at this location, should the City be ultimately required to do the work in accordance with the Commission order. The Bureau of Streets of the Department of Streets and Sanitation, under the direction of Deputy Commissioner Robert L. Zralek, Room 711, City Hall, will be responsible for any work which might be performed at this crossing, and all future correspondence should be directed accordingly. We are forwarding your letter of October 19, 1965, to Deputy Commissioner Zralek.

At this time, we would call to your attention that the City of Chicago does not have a dedicated street across this crossing, and will most likely appeal the Order of the Illinois Commerce Commission until such time as the dedicated street 66 feet in width is acquired across both railroad rights-of-way.

The Indiana Harbor Belt Railway Company has agreed to dedicate a street across its right-of-way on Lawndale Avenue, but, because of certain internal management problems, the Belt Railway Company of Chicago was unable to agree to giving the City a dedicated street across this right-of-way. Until the ownership problems at this crossing have been resolved, the City will be unable to sign any contracts as required by the Department of Public Works and Buildings.

"SALE AND ERROR"

(States Attorney of Cook County—W. R. M.—March 11, 1966)

We desire to call your attention to a letter from attorney Nathan Norman Eglit, dated January 27, 1966, addressed to your office (and carbon copy sent to this office) wherein he stated that the portion of North Leoti Avenue (shown on the copy of the plat attached to said letter) was a City street and should be tax exempt property.

Nonetheless, said real property was put up for sale for general taxes on February 23, 1966 and had been sold for general taxes for certain years prior thereto.

Please be advised that attorney Eglit's information is correct. Our investigation shows that an Easement for street purposes was granted to the City of Chicago on September 26, 1952 and that said grant was recorded in the office of the Recorder of Deeds of Cook County on June 22, 1953 as Document No. 15649928, in Book 49318, Page 579 (Xerox copy of Easement is hereto attached).

It further appears that by virtue of said Easement said area was accepted as a City street by the City Council on January 26, 1953 by ordinance (Council Journal dated January 26, 1953, page 4146).

We further advise that Document No. 12463416 and No. 12530970, referred to in Easement Document No. 15649928 were checked out by the undersigned to ascertain the intent of the grantors. It is our considered opinion that all three instruments intended to and did grant an Easement to the City of Chicago for such purposes as were therein contained. However, we would like to call your further attention to the fact, that, while the three documents follow the same form, the one granting the Easement for North Leoti Avenue fails to have the word "*back*" precede the word "*taxes*" thereon, in the first paragraph of page 2 (see page 2 of Xerox copy attached hereto, whereon we have added this word). The apparent inadvertent absence of this word was perhaps the reason for having this property carried on the books of the Assessor as *private property*.

In our measured opinion, the grant of the Easement to the City of Chicago for a City street, inter alia, executed by the grantors in the aforementioned Document and the acceptance thereof by the City Council, despite this apparent error cited above, did create a public street and should be exempt from general taxation.

We therefore respectfully request that your office initiate "Sale and Error" proceedings to correct this erroneous assessment and so that henceforth this property shall be declared exempt from general taxes as a City street.

Section B. USE OF STREETS, ALLEYS AND SIDEWALKS

PROCEDURES TO EFFECT SIDEWALK REPAIRS

(G. K.—C. P. H.—May 26, 1961)

Your request made to the Mayor's Office of Inquiry and Information concerning property owners responsibility regarding sidewalks in front of their property has been referred to this office for reply.

Under the Statutes of the State of Illinois, the City of Chicago is authorized to provide, by ordinances, for the construction and repair of sidewalks and to provide for the payment of such improvements by special taxation against the abutting property owners (Ill. Rev. Stat. 1959, Ch. 24, Section 63-1 to 63-8).

When a large number of sidewalks are badly in need of repair, the Board of Local Improvements of the City of Chicago is authorized by statute, to cause an ordinance to be adopted by the City Council for the construction of new sidewalks to be paid for by special assessment by the abutting property owners (Ill. Rev. Stat. 1959, Ch. 24, par. 84-7; Op. Corp. Coun. Vol. XX, p. 304). In view of this statutory authority, the City Council may provide, by ordinance, for the repair or new construction of sidewalks in need of repair to be paid for by special taxation or special assessment, to be levied against the owners of the contiguous properties.

We also call your attention to the fact that under the ordinances of the City of Chicago, property owners may rebuild and repair sidewalks in front of their premises at their own expense, provided permits are obtained from the Department of Streets and Sanitation and the work performed and the materials used are in accordance with the applicable ordinances (Municipal Code of Chicago, Sections 33-23 to 33-46).

ALLEY ENTRANCE TO PARKING LOT

(Deputy Commissioner, Department of Buildings—E. W. P.—June 15, 1961)

We have your letter of June 6, 1961, together with enclosures from the permit file relative to the subject location. You state that question has been raised by surrounding property owners regarding the use of designated private alleys as a means of ingress through the off-street parking for the contemplated twenty-six unit apartment building under construction. You wish to have our opinion as to whether or not the so-called private alleys will provide the means of ingress to this off-street parking and also whether or not the subject property has equal property rights for the use of these private alleys. You state that if the applicant does not have the rights for the use of these alleys, then the off-street parking requirement would not be fulfilled and the permit would be a nullity.

Amongst the papers you enclosed are copies of a plat of resubdivision dating back to 1892 and of deeds to adjacent property or to one of the private alleys dated 1922.

With your correspondence you attach letter from the law firm of Abrams, Linn and Ness of 100 N. La Salle St., Chicago 2, Illinois, which acknowledges your letter to them and states that they are instructing their clients to voluntarily cease construction of the twenty-six unit apartment building pending a determination of the rights of their clients to use the private alleys designated on the Plat of Subdivision, or in the alternative for the receipt of a Driveway Permit.

We have checked the Plat of Subdivision, which you enclosed, which was approved July 9, 1892 showing a private alley between 75th Street and what is now 75th Place off of Coles Avenue. This is a 12-foot alley. This alley, according to the Sanborn Map, Vol. 27, No. 42, dead ends because the other private alley shown on the map of subdivision no longer exists due to the building over of a garage building.

The private alley running west off of Coles Avenue is also shown on the Plat as Subdivision "E", Document 1697716, which corresponds with the Plat of Subdivision which you enclosed, and this private alley owned by the property owners on both sides of the alley is for the convenience and comfort of the property owners in this particular subdivision.

The other private alleys shown in the immediate vicinity on the Sanborn Map are located in another subdivision, Subdivision "D". These other private alleys run east from Exchange Avenue and north off of 75th Place and were originally arranged for the convenience and comfort of the property owners in Subdivision "D".

It is our opinion that, insofar as the use of the present driveway off of Coles Avenue, the applicant who also owns part of the private alley has the right to use it just as the other occupants have in Subdivision "E". Whether or not the applicant has any right to use the alleys in Subdivision "D" would be a matter of private concern of the property owners in Subdivision "D" and we should not give any opinion on this phase of the subject of the private alleys. It, therefore, depends considerably on whether or not the applicant can conveniently reach his parking space going over the private alley located in Subdivision "E", and in the event that all of the regulations of the ordinance are met it is our opinion that he can use this one alley for his purposes.

"CAR HIKERS"

(Commissioner, Department of Streets and Sanitation—E. W. P.—January 31, 1962)

November 17, 1961, you advised us that you were in receipt of a letter from Mr. Maurice W. Lee of the law firm of Perlin and Lee dated November 9, 1961, copy of which letter you attached, in which he called your attention to the "car hikers" operating on the sidewalk and street at East Madison Street west of Michigan Avenue. You ask us for an opinion as to the legality of this operation.

It is our opinion that such practice is unlawful. The power given to city councils over streets and sidewalks is very broad. *Jacobs v. City of Chicago*, 244 Ill. App. 132. The city council may regulate the use of streets and alleys to the extent that it may require sidewalks exclusively reserved for use by pedestrians. *City of Chicago v. Collins*, 175 Ill. 445. This power equally applies to the reservation of streets for normal and regulated automobile and pedestrian travel.

July 1, 1957 on page 557 of the recent Volume 24, Opinions of Corporation Counsel, Hon. John C. Melaniphy, the Corporation Counsel, in writing on this subject quotes Section 36-49 of the Municipal Code, which provides as follows:

"It shall be unlawful for any person including the owner of any business adjacent to or near the public way, either in person or through any agent or employee to stand upon, use or occupy the public ways to solicit the trade, custom or patronage for such business, or to interfere with or impede any pedestrian or any one in a vehicle on a public way, for purpose of soliciting business.

Any such soliciting of business on any public way is hereby declared to be a nuisance and the owner or proprietor of any such business who shall refuse or neglect to abate such nuisance after being notified in writing so to do by the commissioner of police, shall be fined not less than ten dollars nor more than two hundred dollars for each and every day he shall refuse or neglect to abate such nuisance.

Provided, nothing in this section shall be construed to include any business operated wholly or entirely upon any public way under or by virtue of a lawful permit or license issued therefor."

INGRESS AND EGRESS

(Mayor's Office of Inquiry and Information—E. W. P.—April 13, 1962)

We have your letter of August 8, 1962, in which you advise that the Mayor has received a petition with 252 signatures from property owners relative to the use of Racine Avenue between 33rd and 34th Streets by Material Service Corporation. You further state that the chairman of the group has notified you that there will be 500 people at the site to block the ingress and egress of Material Service trucks.

The right of ingress and egress by owners or occupants of property abutting upon State highways is set forth in Section 121-4-204 of the State Statutes which provides as follows:

"Except where the right of access has been limited by or pursuant to law every owner or occupant of property abutting upon any State highway shall have reasonable means of ingress from and egress to the State highway consistent with the use being made of such property and not inconsistent with public safety or with the proper construction and maintenance of the State highway for purposes of travel, drainage and other appropriate public use . . ."

The Supreme Court of Illinois has considered in its opinions that the rule governing State highways is equally applicable to the rule governing public streets. The Courts have laid down the principle in several cases as follows:

"Owners of property bordering upon a street have, as an incident of their ownership, a right of access by way of the streets which cannot be taken away or materially impaired without compensation. (*Malleable Iron Co. v. Park Commissioners*, 263 Ill. 451; *City of Chicago v. Union Building Ass'n*, 102 Ill. 379; *Shrader v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co.*, 242 Ill. 227.) . . ."

The zoning map in which this location is shown is at page 124B of the Zoning Ordinance, Map 8-G, and this map, together with the Sanborn maps, indicate that Material Service is so situated that the truck routing at this particular address must necessarily pursue Racine Avenue between 33rd and 34th Streets in order to have access to Material Service which is on the east bank of the Chicago River.

It is true that the City does have power to regulate the use of streets and to regulate traffic upon the streets, sidewalks, public places and municipal property, but the regulation must be reasonable and not in variance with the right of the abutting property owners for ingress and egress. The City has no power to arbitrarily interfere with the ingress and egress. It may be that a study may show a different pattern of traffic approach for Material Service but this does not appear from my analysis of the location and the maps. It is our opinion that any action on the part of the local residents would be extremely inadvisable and that this matter should have the benefit of full study and determination as to the best procedure on the part of the proper public officials.

OWNER OF ABUTTING PREMISES

(*R. W. M.—E. W. P.—August 23, 1963*)

We have your letter dated August 15, 1963, in which you advise that the sidewalk surrounding the U. S. Courthouse, Chicago, Illinois, is in dire need of repair. The sidewalk is over part of your basement, although you advise that it is unknown whether this part of the basement is on your property. You request our opinion as to whether the Federal or the City Government has the responsibility to perform the repairs.

We have taken this matter up with the Department of Streets and Sanitation and based on the information that we have received, the responsibility for the repair of the sidewalk is with the Federal Government under Chap. 34 of the Municipal Code, particularly Sections 34-44 through 34-47. We quote the pertinent sections:

"34-45. Every person using the space under any sidewalk shall at all times keep such sidewalk in good condition and repair and clear and free from all snow, ice, dirt, filth or other obstructions or incumbrances. All such repairing and cleaning shall be done in accordance with the regulations of the department of public works.

The commissioner of public works shall order the revocation of the permit for failure to comply with any provision of this section.

"34-47. The owner and the person in possession of the abutting premises, in front of which a coal hole or vault is constructed, shall be held jointly responsible to the city for any and all damages to persons or property in consequence of any defect in the construction of such vault or coal hole, or for allowing the same, or any portion thereof, to remain out of repair, and such owner shall be required to keep such vault or coal hole, its walls and coverings in good order at all times. . . ."

MICHIGAN AVENUE DRIVEWAY PERMITS

(*Commissioner of Streets and Sanitation—A. F. G.—September 25, 1963*)

In your letter of September 10, 1963, you state that it was the policy of the Chicago Park District since 1935 to deny applications for permits for driveways on Michigan Avenue from Oak Street to Roosevelt Road. You state also that you have an application from the Studebaker Theatre for a permit for an eight foot driveway at 418 S. Michigan Avenue and for an existing sixteen foot driveway at 420 S. Michigan Avenue that leads to a sixteen foot private alley immediately south of the Studebaker Theatre.

You state that it is the desire of your department, following the policy of the Chicago Park District, to deny applications for driveway permits on Michigan Avenue in order to prevent undesirable traffic interference.

You then ask the following questions:

1. Can the Department of Streets and Sanitation continue to enforce the policy of denying applications for driveway permits on Michigan Avenue between Oak Street and Roosevelt Road, established by the Board of Commissioners of the Chicago Park District in 1935?
2. Can the Department of Streets and Sanitation deny the driveway application of the Studebaker Theatre?

3. Can the Department of Streets and Sanitation require the Studebaker Theatre to close the existing opening?

4. If this request cannot be denied under continuation of the Park District policy, what steps would the Department of Streets and Sanitation have to take to legally deny this request?

5. If the Department of Streets and Sanitation cannot order the Studebaker Theatre to close the existing opening under continuation of the Park District policy, what steps will the Department of Streets and Sanitation have to take to secure the closing?

6. If this driveway application cannot be denied under continuation of the Park District policy, can an ordinance be passed by the City Council which would prohibit driveways on Michigan Avenue between Oak Street and Roosevelt Road?

When Michigan Avenue, formerly under the jurisdiction of the Chicago Park District, was taken over by the City of Chicago it became a city street subject to the ordinances of the City of Chicago applicable thereto.

Sections 33-16 and 33-17 of the Municipal Code of Chicago deal with applications for driveway permits and the issuance or denial thereof. The Commissioner of Streets and Sanitation is authorized to issue or deny permits for driveways according to the provisions thereof. Section 33-17 reads, in part, as follows:

"An application shall be approved and a permit issued only upon a determination of the commissioner of streets and sanitation that the driveway will not (1) create undue safety hazards in the use of the street, parkway or sidewalk by vehicular or pedestrian traffic, nor (2) impede the safe and efficient flow of traffic upon the streets and sidewalks adjoining the property for which the driveway is proposed, and upon his determination that the existing and proposed use of the property to be connected by said driveway is in all respects in conformity with existing traffic, zoning, and building ordinances."

Our answer to questions 1 and 2 is that the Commissioner of Streets and Sanitation may deny these applications for driveway permits under authority of Section 33-17 above quoted.

Our answer to question 3 is in the affirmative. The driveway being maintained without a permit or bond is in violation of law and you may order its removal. Questions 4, 5 and 6 are answered by the foregoing.

LEASING OF PUBLIC STREET

(Mayor's Administrative Office—W. M. Z.—March 30, 1964)

Please refer to your communication of March 25, 1964 regarding the opinion which was rendered February 27, 1964 concerning the City-owned lots at 39th and Halsted Streets.

In answer to your request for our opinion in re the legal possibility to execute a lease for a period of ten years with option to renew ten years with the further provision that the lease would be restricted so that no permanent structure would be placed upon the City-owned lots and the lessee would agree to relinquish the said property on notice, we must state that our opinion would be that the said proposed lease would be void and that the City would not and does not have the authority to execute such a lease.

We further wish to state that because of our opinion referred to above, the Chicago Plan Commission would not be in a position to pass upon such a proposal.

May we call your attention to our opinion dated November 27, 1942, which appears in Volume 21 of the Opinions of the Corporation Counsel, which states as follows:

No. 10714—Page 194.

"The City has no power to lease a portion of the surface of a public street to private individuals for railroad or other private purposes.

Citation Case: *People v. Wolper*, 350 Ill. 461 (1932).

We further wish to call your attention to Opinion No. 10081, which appears in the Opinions of the Corporation Counsel in Volume 20, which reads as follows:

Page 217—No. 1008.

"The erection of a contemplated building which would fall within a street which had been established as a public highway in 1857, would constitute an encroachment upon the City's rights in the street, and until competent legal authority declares said street to have been abandoned or vacated, no house number certificate for such house should be issued.

Citations: *Rodgers v. Hess*, 325 Ill. 603 (1927).

Hanser v. Green, 275 Ill. 221 (1916).

Champlin v. Morgan, 20 Ill. 181 (1858).

and also in the same Volume, Opinion No. 9743, Page 220, which reads as follows:

"Dealers in second-hand cars have no right to obstruct the streets and sidewalks outside of their premises with their merchandise. The streets and sidewalks are intended for the use of all the people, and the City may and has the duty to prevent their use for private purposes."

We specifically call to your attention the *People v. Wolper* in the Illinois Reports No. 350 on page 466 which states the following:

"These rights of the public are inconsistent with the right of a private citizen to encroach upon the streets by the erection of a permanent structure. Streets are held in trust by the municipality for the benefit of the public and may not be given away by ordinance. (*People v. Corn Products Co.*, 286 Ill. 226; *Tolman v. City of Chicago*, 240 id. 268; *People v. Atchison, Topeka and Santa Fe Railway Co.*, 217 id. 594; *People v. Harris*, 203 id. 272; *Snyder v. City of Mt. Pulaski*, 176 id. 397."

ALLOCATION OF FUNDS FOR SIDEWALKS

(Commissioner, Department of Streets and Sanitation—E. W. P.—August 19, 1964)

We have your letter dated August 12, 1964 in which you advise that in the resolution concerning sidewalk repairs passed by the City Council on June 24, 1964, paragraph two states: "The sidewalks being repaired shall be located in an area that is zoned residential."

You state in your letter that you have received inquiry concerning the repair of sidewalks adjacent to schools, churches and parks in areas which

are zoned residential. You ask our opinion as to whether or not you can match funds on a 50-50 basis with religious institutions, the Chicago Park District and the Board of Education for the repair of defective sidewalks in these areas.

With reference to the Chicago Park District we direct your attention to Chap. 105, Sec. 154 of the Illinois Revised Statutes (1963), which provides as follows:

"That whenever any boulevard or parkway under the control of any public park commissioners is in need of improvements or repairs, it shall be competent for said park commissioners to make such improvements or repairs; or whenever any public street, avenue or alley under the control of any city, town or village adjoining any public park, or pleasure ground under the control of any public park commissioners is in need of improvements or repairs, it shall be competent for said park commissioners and said city, town or village, from time to time, to enter into an agreement for the payment to such city, town or village, by such park commissioners, of such portion of the cost of the improvement as may in the judgment of said commissioners be of benefit to said park or pleasure ground, or to enter into an agreement for the making of such portion of the improvements or repairs by said park commissioners to any such public street, avenue or alley adjoining such public park or pleasure ground."

It is therefore our opinion that the Chicago Park District assumes all of the obligations for improvements or repairs of sidewalks wherever the boulevard or parkway is under the control of the park commissioners. This would include all of the streets and avenues within the park; however, when the improvements or repairs are necessary for the sidewalks under the control of the City but adjoining the public park, then you may match funds on a 50-50 basis in accordance with the ordinance and enter into such agreement for the payment of the proportionate share of the improvements or repairs. You will note that we refer to ordinance rather than to resolution and this is because subsequent to the passage of the resolution, to which you refer, an ordinance was passed on July 8, 1964 at p. 2978 of the Journal, covering the maintenance and repair of existing sidewalks, known as "Sidewalk Repair—1964" which covers your subject. The provision in Section 154 of the chapter on Parks was saved from repeal by the General Park District Code, Section 8-2 of Chap. 105.

Relative to the Board of Education, I discussed the question that you raise with Hon. James Coffey, Attorney for the Board, and Dr. Lederer, Assistant Superintendent in Charge of Operations of the Board. I am advised that there are a number of requests for repairs of sidewalks that have been transmitted by the Board of Education to your office. I am further advised that the personnel of the Board will be very happy to cooperate with the City of Chicago in the matching of funds, which, however, at present will have to be on a limited basis because of lack of money on the part of the Board of Education. The Board is also interested in the repair of curbs and gutters adjoining the sidewalks and I understand from your office that you can match funds for this purpose from another source. These details can be worked out, we are sure, and it is our opinion that you can match the funds with the Board of Education for the repair of defective sidewalks along the boundaries of their schools and institutions.

With reference to matching of funds with religious institutions, it is our opinion that this also can be done. Mr. Rice, of your office, advises that you have received a great number of applications from religious institutions to cooperate with the City in the matching of funds, and it is our opinion that this objective is part of the reason for the resolution and ordinance. We are attaching copy of the resolution and the ordinance on this subject for ready reference.

OCCUPATION OF BRIDGE BY THE CITY

(Commissioner, Department of Public Works—M. M. M.—January 12, 1965)

In response to your letter of May 25, 1964, our office filed a petition with the Illinois Commerce Commission requesting that the Chicago & North Western Railway Company be required to repair the deteriorating conditions on the Kinzie-Orleans Street Viaduct in accordance with the contract ordinance of March 25, 1916. The Hearing on the City's Petition was held on December 2, 1964 at which time the Railroad introduced evidence that they had sold the bridge and several parcels of adjacent land to the Wolf-Point Development Corporation which, in turn, sold the bridge to the Kinzie-Orleans Corporation, a wholly owned subsidiary.

As you are aware, the original ordinance of 1916 provided a \$250,000 penal bond to insure the performance of all of the obligations assumed by the Railroad including maintenance. This bond was written by the National Surety Company which was placed in liquidation on April 29, 1933 by the New York Department of Insurance. National Surety Corporation, the successor, did not file an assumption of liability of this bond in the City Clerk's Office so the bond has terminated and therefore we are unable to proceed against the surety on the original contract.

On December 15, 1964 a conference between the city representatives and attorneys for the North Western Railway Company and the Kinzie-Orleans Corporation took place in Mr. Michuda's office. The Kinzie-Orleans Corporation outlined tentative plans to build an office building complex adjacent to the viaduct. Their plans depend upon their obtaining extensive financing which is still in the discussion stage.

The position of the North Western Railway Company and the Kinzie-Orleans Corporation is that neither is the owner of the bridge and that neither has the duty to maintain the bridge. Both further assert that the City owns the bridge. At this meeting the Kinzie-Orleans Corporation offered to do extensive rehabilitation to the bridge if and when financing became available but they could not give any definite date for commencement of work or any exact details on the nature and extent of the rehabilitation except that a 40' wide grate running the width of the bridge would be required for ventilation of train operation under the building they propose to erect.

On December 21, 1964 Mr. Michuda and the writer conferred with the attorney for the Kinzie-Orleans Corporation at their office. At this meeting, the Kinzie-Orleans Corporation's attorneys gave Mr. Michuda an estimate made by a contractor hired by the North Western Railway Company to estimate the cost of repairs. Since this estimate was approximately 7% of the City's estimate Mr. Michuda was to contact the contractor and discuss the variance. Mr. Michuda also promised to review the City's estimate to see if there might be a possibility of reducing it.

The next hearing was held January 6, 1965 at 10 A.M. at which time we filed our amended Complaint seeking relief under Section 58, Chapter 111%, which does not require ownership of a crossing or viaduct by a railroad. At this time the North Western Railway Company was granted a continuance to file a written answer to the City's Amended Complaint.

The next hearing scheduled for February 1, 1965, at 10 A.M. is being continued to February 9th to allow the attendance of all City witnesses.

Our office first plans to follow through for a final decision in this matter before the Illinois Commerce Commission. Subsequently, if either the Chicago

& North Western or the Kinzie-Orleans Corporation continues to deny ownership or maintenance responsibility of the bridge we will file a suit for declaratory judgment to determine the ownership and right and duties of the parties. It is the opinion of this office that the original contract ordinance gave the City the right to occupy the bridge and approaches thereto as a public street and did not confer ownership.

PROCEDURE FOR EXTENSION OF RIGHT OF WAY

(L. M. J.—T. A. D.—July 30, 1964)

In your letter of July 24, 1964 you inform us that in preparing your Streets Improvement section of the 1965 Capital Improvement Program you observe that at two locations the right-of-way of two streets narrow, for no apparent reason, from the right-of-way on either side thereof.

That is, you state that the records of the Bureau of Maps & Plats of the City concerning Irving Park Road between Oakley and Western Avenues show the North half of the street to be laid out with a 33 foot right-of-way, whereas East and West of said block the North half right-of-way of Irving Park road is 50 feet.

You further report that the Martha Washington Hospital fronts on said street at said location and that its buildings are all set back a considerable distance from the streets. In addition, you advise us that the sidewalk, curb and fence lines along the North side of said Irving Park Road in the block between said Western and Oakley are in ??? with the block adjacent thereto, and that the 50 foot northerly strip of Irving Park Road between Western and Oakley has been used as a public thoroughfare for many years.

You further relay to us the information that the South side of Foster Avenue, to a point 816 feet East of California Avenue, has a ?? foot right-of-way on the records of the City Bureau of Maps & Plats but the actual measurements show the said South side of Foster to have a 33 foot strip. You also indicate that the areas East and West of said point have a 33 foot half right-of-way.

In your said inquiry of July 24, 1964, you pose the following questions and request our opinion thereon:

1. Would it be necessary for the City to purchase the additional right-of-way in order to make the streets consistent in width through these areas; or,
2. Could a Quit-Claim Deed be obtained from the agencies involved, in order for the City to acquire it without having to purchase it; or,
3. Would the City be legally able to widen the streets involved without further legal action, inasmuch as the sidewalk or parkway areas in question have been used by the public for a number of years.

In response to query No. 1, we should like to inform you that, in our opinion, it may not be necessary for the City to purchase the additional right-of-way to make the streets consistent in width through these areas for the reasons hereinafter set forth;

No. 2. A Quit Claim Deed could be obtained from each Hospital involved, conveying to the City such interest, if any, said Hospitals now have in and to the areas involved; this would obviate the necessity of the City's purchasing said strips of land.

No. 3. Whereas, in our opinion, the City could conceivably be legally able to widen the streets involved herein without further legal action, inasmuch as you maintain that the sidewalk or parkway areas in question have been used by the public for many years, it may be essential to have some judicial determination of the City's right to widen said streets.

In other words, despite the fact that the City could succeed in establishing its right to have the said portions of streets declared to be public ways by prescription and user, since no judicial decree, Court Order or Court Judgment to such effect has heretofore been entered, it may be necessary for the City to institute legal proceedings to effectuate said results.

To eliminate the necessity of a judicial determination of the City to utilize said street areas as public ways, we therefore recommend that you request William E. Hoerger, the Real Estate Agent of the City to negotiate with the said hospitals in an effort to obtain from them a Quit Claim Deed relinquishing to the City such interest, if any, they may have in and to the areas involved.

Since the procurement of said Quit Claim Deed would clarify and stabilize the status of the said street areas for all time and might be effected in a minimum of time, it may be feasible to have this matter resolved very quickly to enable you to include these areas in the year 1965 Capital Improvement Program.

AUTHORITY OVER VIADUCT CLEARANCE SIGNS

(Commissioner, Department of Streets and Sanitation—M. J. H. & S. R. D.—May 3, 1965)

We acknowledge receipt of your communication, dated April 12, 1965, calling attention to the public interest in having the clearance of all viaducts in the City appropriately posted. You attached copies of letters, one addressed to His Honor, the Mayor, by the Illinois Movers & Warehousemen's Association, and the other addressed to the Commissioner by the Illinois Insurance Associates. These letters indicate the danger of accidents from the lack of proper clearance posting and the loss of time in routing truck traffic when clearances are not known.

You express the opinion "that the City should see to it that structures are properly signed." You state that "it is immaterial whether or not it is done by the City or another agency." You request our opinion whether the result can be legally accomplished.

Section 11-107-1 of the Illinois Municipal Code (Ill. Rev. Stat. 1963, chap. 24, par. 11-107-1) provides:

"The corporate authorities of each municipality may construct, repair and regulate the use of bridges, viaducts and tunnels."

This authorizes the City to post clearances on and for the viaducts which it owns or controls.

The Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat. 1963, chap. 95½, par. 126(c)) provides:

"The Department shall erect and maintain guide, warning and direction signs upon highways in cities, towns and villages of which portions or lanes of such highways are under the control and jurisdiction of the Department or for which the Department has maintenance responsibility."

The Department is the Department of Public Works and Buildings.

This State Department, in its "Uniform Traffic Control Devices for Streets and Highways" (May, 1963) at pp. 59, 88, 102, 112, provides standards for 2 different clearance information signs, one to be erected over the structure at its intersection with the roadway and the other to be erected at a point in advance of the intersection to give drivers of critical vehicles an opportunity to choose an alternate route. The manual indicates that such signs will be posted on or for any structure where the clearance is less than 14 feet, 6 inches. That is 1 foot more than the highest vehicle permitted by Sec. 125a, U. A. R. T. (Ill. Rev. Stat. 1963, chap. 95½, par. 222a).

The Illinois Municipal Code (Ill. Rev. Stat. 1963, chap. 24, par. 11-80-1) provides that all provisions of the Municipal Code relating to the City's control over streets, alleys, sidewalks and other public ways are subject to the provisions of the Uniform Act Regulating Traffic on Highways. From this, the State has the right to post clearance signs on state roads running through the City.

Opinions of the Corporation have dealt with the City's power to regulate viaducts owned by railroads. Vol. 23, p. 725, May 9, 1951, re: Clearance Signs—Charles P. Horan. Vol. 22, p. 485, Feb. 17, 1948, re: Diagonal stripe painting—James J. Danaher. Vol. 18, pp. 600, 601, May 4, 1931, re: Safety devices—Carl J. Appel. These opinions are in agreement that the City has no authority to regulate viaducts owned by railroads or public utilities subject to regulation by the Illinois Commerce Commission. Mr. Danaher's opinion indicates that the City must provide for signs or safety devices in the contract between the City and the railroads under which the viaducts were constructed, before the City can compel the posting or erection of signs.

In view of the foregoing, it is our opinion that the various truck owners should present their grievances to the Illinois Commerce Commission for consideration.

REMOVAL OF SIGNS

*(Commissioner, Department of Streets and Sanitation—E. W. P.—
June 22, 1965)*

Reference is made to your memorandum of April 14, 1965, to the Corporation Counsel, concerning interdepartmental meetings relating to advertising signs over public ways in which you quote a number of sections of the Traffic Act. These laws prohibit the placement of signs upon a street or highway and grant jurisdiction to the municipal authorities to remove unauthorized signs.

Your memorandum requested our opinion as to your authority to remove these signs and also requested our aid in any legal action to enforce compliance. It is our opinion that you do have the authority to remove unlawful signs. However, there are several matters in litigation and we suggest that you furnish us with the addresses where these signs are located and whether permits were issued in any instance. We will then check our records and give you our specific opinion as to each individual sign and the proper procedure to be taken in correcting the situation.

DRIVEWAY GRADING ON PRIVATE PROPERTY

(Commissioner of Public Works—H. S.—December 8, 1966)

Please refer to your letter of October 27, 1966 with reference to the above subject, wherein you requested advice as to procedure or requirements with respect to the manner of handling the changing of grade and repaving of private driveway between two factories just west of the river, which will result from the new construction on said bridge and approaches.

We are of the opinion that a license should be obtained from the owners for the purpose of going upon their property to repave the new driveway resulting from the change of grade, and that a release should be obtained from such factory owners for any possible claims or damages that might arise by virtue of the change of grade and by any inconvenience these factories may suffer during the repaving of their driveway.

You must also give them proper notice required to be given in all cases involving excavating, under Chapter 70, Section 10, Illinois Revised Statutes, 1966.

If you proceed to do this work without such agreements and releases, you may subject the City to damage suits in substantial amounts for damages caused by change of grade, trespassing on their property and loss of time and inconvenience that they may claim during the repaving of the driveway.

Section C. ADVERTISING AND HANDBILLS

HANDBILLS ON PUBLIC WAYS

(Editor, Big League Players Guide—E. W. P.—February 10, 1961)

We have your letter of February 6, 1961, addressed to Hon. Richard J. Daley, Mayor of the City of Chicago, in which you advise that you are going to publish a monthly paper starting in April called the Chicago Baseball News. This paper, you state, will be devoted entirely to the promotion of baseball, including pictures and news on the Chicago Cubs, Chicago White Sox, and semi-pro baseball in Chicago.

You ask that you be granted permission to hand out to the fans, free, on the City sidewalks in front of Wrigley Field and Comiskey Park, this paper. You state that nothing will be sold, but your paper will contain a request for a subscription at \$1.00 per half a year and \$2.00 for one full year.

Sections 36-28 and 36-29 provide, respectively:

"It shall be unlawful for any person to distribute advertising matter of any kind on any public way or other public place of the city otherwise than from hand to hand, without tossing or throwing, or to distribute, hand out or scatter on any public way any handbills or dodgers of a size four and one-half inches by six inches or larger, or any other loose sheets of advertising matter which would litter the public ways if allowed to drop thereon; provided, that such handbills, dodgers, or loose sheets, if enclosed in envelopes or folded or other-

wise handed out in such a manner as to avoid the likelihood of falling while being passed out, may be distributed from hand to hand if not tossed or thrown.

"No person shall hand circulars, handbills, folders or other advertising matter to the occupants of automobiles operated or standing in the public way, or place or thrust such circulars, handbills, folders or other advertising matter into or upon or under the windshield wiper of an unoccupied automobile standing in the public way. Any person violating any of the provisions of this section shall be fined not less than two dollars nor more than ten dollars for each offense."

These provisions in the Code are self-explanatory.

ADVERTISING FROM HELICOPTERS

(Mayor's Office of Inquiry and Information—J. E. S.—February 17, 1961)

You recently requested information for the above named party as to whether or not the City ordinance prohibits the use of public address equipment on or from helicopters flying over the City of Chicago.

Be advised that Chapter 36, Section 28.1 through 28.3 of the Municipal Code of the City of Chicago does so forbid the use of such equipment and also forbids the towing of advertising displays or the distribution of circulars, posters, hand bills or other advertising matter from aircraft. Specifically, Section 28.3 reads:

"No person while operating any type of aircraft over the City shall use, cause, permit or allow to be used, any sound amplifier or similar mechanical device for the purpose of advertising goods, wares or merchandise."

We hope that the foregoing may be of some assistance to you.

ADVERTISING DEFINED

(Superintendent of Police—E. W. P.—January 2, 1962)

We are writing to you relating to our telephone conversations pertaining to the enforcement of Section 36-28 of the Municipal Code, which reads as follows:

"It shall be unlawful for any person to distribute advertising matter of any kind on any public way or other public place of the city otherwise than from hand to hand, without tossing or throwing, or to distribute, hand out or scatter on any public way any handbills or dodgers of a size four and one-half inches by six inches or larger, or any other loose sheets of advertising matter which would litter the public ways if allowed to drop thereon; provided, that such handbills, dodgers, or loose sheets, if enclosed in envelopes or folded or otherwise handed out in such a manner as to avoid the likelihood of falling while being passed out, may be distributed from hand to hand if not tossed or thrown."

You have received copies of several recent communications written to the Corporation Counsel with reference to this subject.

The views of the office of the Corporation Counsel were expressed in opinions, Volume 20, pg. 222 and Volume 21, pg. 194. The first opinion mentioned was rendered by Barnet Hodes, former Corporation Counsel of the City of Chicago, and the second opinion cited was rendered by Walter V. Schaefer, former Assistant Corporation Counsel and now Associate Justice of the Supreme Court of the State of Illinois. We are attaching copies of these opinions for your file. They both deal with the same subject matter, although in the Hodes opinion it was cited as 4281 of the Code of 1931; and in the Schaefer opinion the ordinance had been amended by substituting "public ways" for "public streets or sidewalks" and bears the same present number as 36-28.

The law is well stated on pages 2 and 3 of the copy of the Schaefer opinion as follows:

"In the enforcement of this ordinance, the first question to be determined by your Department is whether or not the handbill in question constitutes advertising matter; if this question is answered in the negative distribution of the handbill is not affected by the ordinance. As we have stated, the ordinance deals only with the distribution of advertising matter, and handbills whose only purpose is to present political, economic and social views and arguments do not fall within its scope. If the handbill constitutes advertising matter, however, then its size and the manner of its distribution must be in accordance with the provisions of the ordinance.

"This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties." This paragraph quotes the United States Supreme Court in *Schneider v. State*, 308 U. S. 147, 84 L. ed. 115 (1939).

"* * * We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handling literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets."

ADVERTISING RESTRICTIONS

(Chairman, Zoning Board of Appeals—E. W. P.—January 26, 1962)

We have your letter dated January 17, 1962, in which you advise that there is a case pending before you, No. 28-62-A, involving an appeal of the Triangle Outdoor Advertising Company from an order from the Office of the Zoning Administrator to remove a painted advertising sign on the east side of a building located at 2834-36 W. Van Buren Street for the reason that the sign is located within 400 feet of the Congress Expressway. You state that the testimony at the hearing indicated that this sign, or a like sign, had been on the building continuously since November, 1955, that the identity of the advertiser had been the same but the text of the sign had been changed from time to time. You ask our opinion as to whether or not, under these circumstances, you have the power to permit the continued use of this sign.

The first question which presents itself is whether or not a permit was obtained for the advertising sign allegedly placed on the building in 1955. Section 193-20 reads as follows:

"No person shall post, stick, stamp, tack, paint, or otherwise fix, or cause the same to be done by another person, any notice, placard, bill, handbill, sign, poster, card advertisement, or other device calculated to attract the attention of the public, upon any building or part thereof, wall or part thereof, or window, without first obtaining the written consent of the owner, agents, lessee, or occupant of such premises or structure; provided, however, that *no person shall paste, post, or fasten any handbill, poster, advertisement, or notice of any kind, or cause the same to be done, which exceeds twelve square feet in area without first obtaining a permit so to do from the commissioner of buildings in accordance with the provisions of this code relating to billboards and signboards*; and provided, further, that this section shall not apply to advertising matter upon billboards owned or controlled by private individuals." (Italics supplied.)

The Triangle Outdoor Advertising Company undoubtedly wish to advertise in a manner calculated to attract the attention of the public. The sign undoubtedly exceeds twelve square feet in area and in order to establish the fact that the sign was legally there in 1955 there must be evidence of the granting of a permit.

Furthermore, even should it be established that the sign was legally there in 1955, it is our opinion that the departure from the text obliterates the original use and that there would no longer be existing a lawful non-conforming use. The new painted sign is an unlawful use and cannot be permitted. The Board in our opinion does not have the power to permit the location of the sign within the 400 feet of the Congress Expressway and it is our opinion that the order of the Office of the Zoning Administrator to remove the painted advertising sign on this building should be affirmed and the petition of the applicant denied.

ADVERTISING ON PUBLIC WAYS

(Chief of the Bureau of Electrical Inspection—E. W. P.—March 13, 1962)

We wish to acknowledge receipt of your letter of March 8, 1962, with reference to application of Triangle Sign Company to "Rehabilitate and Repair Signboards." We note that you informed Mr. Bley of Triangle that this must not include exceeding the previous height or overall dimensions of the legal sign then existing and that you have stopped Triangle on two installations where it was apparent that an entirely new sign was to be erected somewhat removed from the previous location.

You advise that Mr. Bley asks: "May he proceed with this program provided he conforms to our previous stipulation, and uses the exact same holes (for upright supports) as the present sign?"

It seems apparent from Mr. Bley's request that he wishes to erect new signs. We are taking the position in litigation now pending that once a sign is removed it loses its identity as a legal nonconforming use and cannot be replaced.

It is our duty to strictly enforce the ordinance and, furthermore, under its provisions all nonconforming signs under a value of \$2,000.00 are to be eliminated as of July 7, 1962, five years after the effective date of the Zoning Ordinance.

NECESSARY SIGNS

(City Architect—E. W. P.—July 9, 1962)

We have your letter of July 5, 1962 in which you advise that in the course of seeking permits for the erection of illuminated electrical signs in front of certain district police stations, the Building Department authorities have refused the issuance of said permits owing to the fact that said locations are in residential districts. The sites that you mention are:

5430 Gale Avenue
2938 East 89th Street
819 West 85th Street
6120 South Racine Avenue
2259 South Damen Avenue
4802 South Wabash Avenue.

You advise that in each instance the police stations have been in operation on these sites for a considerable number of years and that the signs in question are necessary to indicate said locations as being the site of police stations.

These are identification signs necessary as a governmental function in each location and it is our opinion that the permits should be approved in each instance regardless of the zoning requirements.

NAMES SPONSOR ON ADVERTISEMENT

(Alderman, 5th Ward—R. N.—July 31, 1962)

We are in receipt of a letter from Charles A. Fahey, Executive Director of the Citizens Committee for a Cleaner Chicago, in which he asks the law department advise him as to whether, in our opinion, it would be a legal exercise of the city's power to declare a legal presumption of responsibility in persons whose names appear as sponsors of advertising matter distributed in violation of the ordinances of the city relating to the method of distribution thereof.

We find no legal objection to such placing of responsibility. An example thereof will be found in Section 27-364 of the Code which declares prima facie responsibility for all traffic violations in the person whose name the vehicle is registered. An amendment to Section 36-28 of the Code along the following lines would in our opinion cover the situation:

"Whenever any advertising matter is distributed in violation of any of the provisions of this section (section 36-28), the person whose name appears thereon as the sponsor of such advertising matter shall be prima facie responsible for such violation and subject to the penalty therefor."

If the above is in line with your own ideas and meets with your approval, we shall be glad to draft an ordinance along those lines.

VESTED RIGHT IN SIGN PERMIT

(Chairman, Zoning Board of Appeals—E. W. P.—December 2, 1963)

We have your letter of November 1, 1963, in which you advise that an appeal was filed with your Board on June 17, 1963, from the decision of the Zoning Administrator, who had refused to allow the completion of an advertising sign in an M1-3 Manufacturing District, on premises at 2604 W. Van Buren Street, which, it was alleged, was not within 400 feet of the Congress Expressway. At that time the measurement was taken from the center line of the expressway.

A permit for the sign was issued, approved by the Zoning Administrator's Office, construction started, and later the permit was revoked and the work stopped. You have determined that the sign is a single face advertising sign, facing west and located on a railroad embankment. The sign is 410 feet from the center line of the east route of the expressway from which it is visible. The sign, you further advise, is not visible from the west route of the expressway.

It is our opinion that this sign, as proposed, was a permitted use under the zoning ordinance at the time the permit was issued, and met all the specific requirements as a permitted use. It is our further opinion that the applicant acquired a vested right to the sign after the permit was issued and the work started, and that the recent amendment to the zoning ordinance changing the basis of measurement of advertising signs from the expressway has no application in this instance. We also cite the following:

Fifteen-Fifty State Street Corporation v. City of Chicago, 15 Ill. 2d 408

Deer Park Civic Ass'n. v. City of Chicago, 347 Ill. App. 346.

AMENDMENT TO ZONING ORDINANCE

(Deputy Commissioner, Chief Electrical Inspector, Department of Buildings—R. J. E.—February 26, 1964)

On February 24, 1964, you requested an opinion from this office regarding the above mentioned sign and stating that a permit to erect said sign was issued by your department on May 8, 1963, and that a permit to illuminate said sign was issued on May 9, 1963. You further state that at the time of issuance of these permits the Zoning Ordinance permitted advertising signs to be erected 400 feet from the center line of the roadway, and that the contractor indicated that this sign was to be 700 feet from the center line of the Northwest Expressway.

The ordinance in effect at the time of the issuance of the permits permitted advertising signs to be erected 400 feet from the *center line* of the roadway. However, on July 11, 1963, the subject ordinances were amended to prohibit the erection of advertising signs within 400 feet of the *outer right-of-way* of an expressway.

The two streets and lanes identified by the red ink on the map marked "B" which was attached to your letter, are considered to be part of the expressway system since they are access drives. The Superintendent of the Bureau of Maps and Plats has so designated Ontario and Ohio Streets west of Orleans Street to be part of the expressway system.

Inasmuch as said permits were issued for an advertising sign at the subject location at a time when an advertising sign was a permitted use at said location and inasmuch as certain work and expenses have been incurred by the Arrow Sign Company, the company to whom the permits were issued, it is our opinion that said permits should not have been revoked and that Arrow Sign Company should be allowed to illuminate said sign and to continue its use.

Article V, Section 5.3 of the Chicago Zoning Ordinance provides that where a permit has been issued in accordance with the law prior to the effective date of an amendment and construction is begun within one year of the effective date of the amendment, said structure may be completed. Although said section of the Zoning Ordinance applies to the comprehensive amendment, it is our opinion that it was the intent of the City Council to have the "one year" provision applied to all subsequent amendments to the Zoning Ordinance.

Please be advised that if applications are made for permits they must be granted if they conform to the present Code provisions. The fact that there is an amendment subsequently passed by the City Council in no manner deprives the property owner to have the structure completed under the law that existed at the time of the issuance of the permit.

Since the permit was granted in conformance with the ordinance as it existed at the time of the application for permits and the issuance thereof, the permits should not have been revoked and the construction stopped. It appears that the property owner has established a substantial right prior to the passage of the amendment and that the sign company obtained a legal right to continue its use, subject to amortization under the ordinance as a nonconforming use.

Please be further advised that it is consistent with the ordinance not to issue permits for advertising signs subsequent to the passage of the amendatory ordinance if said advertising signs are located within 400 feet of an expressway and that the access drives and "feeder lanes" are part of the expressway system.

INTERPRETATION OF ADVERTISING MATTER

(M. M. F.—E. W. P.—September 29, 1964)

We acknowledge receipt of your letter dated September 16, 1964, in which you ask our opinion as to whether the following proposed bus ad would be legal in Chicago:

"Free—Home Study Course on the Catholic Religion

Free—Trip to Europe next Summer for best student of the one Course
(in view of competent judges)

1. Send for Course.
2. Send in tests to try to be best student.
3. Name of best student and marks and reasons for selection will be sent to all student contestants.

Selection announced May 1. Lots of time to study and try.

Take One"

The proposed ad does not request any payment or consideration required of the recipient. He participates if he so chooses in a scholastic study and competitive examination. This is similar to an invitation to engage in a competitive examination for college scholarships. The free trip to Europe for which he will be competing, if he so chooses, is educational as well as recreational. The Home Study Course is spiritual and educational and is free. To be a lottery all three elements of price, chance, and prize must be present. (*Iris Amusement Corporation v. Kelly*, 366 Ill. 261; *Commonwealth v. Wall*, 3 N. E. (Mass.) (2d) 28). There is no inconvenience and detriment to the participant. Recently, December 19, 1963, in the case of *Midwest Television, Inc. v. Waaler, State's Attorney of Champaign County, Illinois*, 44 Ill. App. 2d 401, the Court very carefully considered cases involving lotteries. In that case, although a participant in a sweepstakes event could obtain tickets without paying any money or making any purchase, the free ticket could be picked up only at the store conducting the event and thus making purchases at the store could also secure these tickets. The Court there held that the free ticket seeker entering the store became potential customers and there was a benefit accruing to the sponsor. In the present instance described by you none of these factors are present.

It is our opinion that your proposed procedure is lawful. The placement of the ad on the busses is, of course, a matter of contract between your offices and the Chicago Transit Authority.

Section D. TRAFFIC AND PARKING REGULATIONS

PRIVATE PARKING LOT—USE DETERMINED BY ZONING ORDINANCES

(Deputy Commissioner of Buildings—R. W. P.—January 27, 1961)

We have before us your letter dated December 13, 1960, together with copies of letters from William T. Prendergast, City Collector, and the Lake Shore Management Co., owners of four properties, viz: 2909 Sheridan Road, 3180 Lake Shore Drive, 3600 Lake Shore Drive, 3950 Lake Shore Drive, all containing garages restricted to the use of tenants only and where representation is made that gasoline is sold on the premises, not to the general public but to the tenants in the building.

However, there are Court cases on all four locations charging the Lake Shore Management Co. with operating garages and also selling gasoline to the general public. It appears from the information we have that about 25% of the allocated parking spaces, intended for the tenants only, is rented to outside individuals and that the distribution of gasoline is made also to these outside individuals. These are examples where the owners are apparently operating a public garage in a residential district without a license and also operating a filling station in a residential district without a license.

The pertinent provisions relative to off-street parking in an R-6 District are contained in the following sections:

5.8-5 Control of Off-Site Parking Facilities. In cases where parking facilities are permitted on land other than the zoning lot on which the building or use served is located, such facilities shall be in the same possession as the zoning lot occupied by the building or use to which the parking facilities are accessory. Such possession may be either by deed or long term lease, the term of such lease to be determined by the Board of Appeals. The owner of the land on which the parking facilities are

to be located shall be bound by covenants filed on record in the Office of the Recorder of Deeds or the Registrar of Titles of Cook County, requiring such owner, his or her heirs and assigns, to maintain the required number of parking facilities for the duration of the use served or of the said lease, whichever shall terminate sooner.

7.12 Off-Street Parking—Use and Bulk Regulations.

(1) Except as may otherwise be provided for parking of trucks in the granting of special uses, required accessory off-street parking facilities provided for uses listed herein shall be solely for the parking of passenger automobiles of patrons, occupants, or employees of such uses, provided that in an R4, R5, R6, R7, or R8 District, not more than 25 per cent of the accessory parking spaces required for a dwelling, lodging house, or a hotel may be rented out on a monthly basis to occupants of other dwellings, lodging houses, or hotels.

(8) f. Repair and Service. No motor vehicle repair work or service of any kind shall be permitted in conjunction with parking facilities provided in Residence Districts, except that where such facilities are enclosed in a building, gasoline and motor oil may be sold within such building to the users of said facilities provided that no sign advertising the sale of same is visible from outside, and provided further, that all gasoline pumps shall be effectively screened from view from the public way.

7.12-2 Off-Street Parking—R4, R5, and R6 Residence Districts.

In an R4, R5, or R6 District, all parking spaces required for one or two-family dwellings, shall be located on the same zoning lot as the dwellings served. Parking spaces required for all other uses which are established after the effective date of this comprehensive amendment, shall be located on the same zoning lot as the use served. Uses, other than one or two-family dwellings, which are in existence on the effective date of this comprehensive amendment and which are subsequently altered or enlarged so as to require the provision of parking spaces under this comprehensive amendment, may be served by parking facilities located on land other than the zoning lot on which the building or use served is located, provided such facilities are located within 500 feet walking distance of a main entrance to the use served, except that such parking spaces required to serve multiple-family dwellings shall be located within 300 feet walking distance of a main entrance to the use served. Off-site parking spaces accessory to a use in R4, R5, or R6 may be located in an R4 or less restricted district but may not be located in an R1, R2, or R3 District.

It is, therefore, by virtue of our Zoning Ordinance, which permits these operations in residential districts, that the Lake Shore Management Company and others similarly situated find themselves in a dilemma. These operators must meet the conditions as prescribed in the ordinance, and so long as they comply they should not be penalized.

It is our opinion that under these sections, which permits the renting of a certain percentage of the parking spaces to occupants of other dwellings than the accessory use, lodging houses or hotels, and the section which permits the sale of gasoline on the premises to occupants of the parking spaces only, that licenses should issue for permission to operate a public garage and also a filling station for their limited operation only. There is no reason why the City should not have this additional revenue, and there is no reason for subjecting other public garages and other gasoline filling stations to unfair competition.

In residence districts we allow restaurants, such as in R-6, General Residence District, to include the sale of liquor in conjunction therewith and cocktail lounges. We do the same with reference to hotels and clubs. In these instances licenses are required and must be issued before operation.

It is, therefore, our further opinion that licenses should be required in the instances set forth and others similarly situated and should be processed in the same manner as other licenses for the same use, regardless of the fact that these garages and filling stations are located in residential districts.

PROCEDURE IN SETTING SPEED LIMITS

*(Chairman, Committee on Judiciary and State Legislation—A. F. G.
—April 28, 1961)*

In your letter of April 7, 1961 you request that we furnish you an opinion as to whether or not the city council has the power to establish a speed limit on trucks in urban districts without posting the streets; and if not you request that a bill be prepared to amend the Traffic Code to give us the power to control speed regulation without the necessity of posting signs.

We do not believe the city council has power to change the maximum speed limits fixed by statute without posting the areas where such speed alterations have been made.

Section 49 of the "Motor Vehicle Act" fixes the maximum speed limits of motor vehicles of both the first and second divisions at 30 miles per hour in urban districts. Urban districts are not limited to residential areas and are defined in Section 1-187 of the said Act as follows:

"The territory contiguous to and including any street which is built up with structures devoted to business, industry or dwelling houses situated at intervals of less than 100 feet for a distance of a quarter of a mile or more."

Section 50 of the said Act, authorized cities, and other local authorities to increase or decrease the speed limits fixed in Section 49, but not to less than 20 m.p.h., nor increase the speed to more than 65 m.p.h. This power however is restricted by paragraph (c) of that section which provides:

"A limit so determined and declared by a park district, city, village, or incorporated town becomes effective, and suspends the application of the limit prescribed in Section 49 of this Act, when appropriate signs giving notice of the limits are erected at the proper place or along the proper part or zone of the highway or street."

The only way Section 50 can be amended to meet your purpose is by striking out the last quoted provision.

We do not believe that a bill to eliminate this provision would be passed by the General Assembly. If many or all of the municipalities in the Chicago area reduced the maximum speed limits in urban districts to varying speeds, it would be possible for a motorist without posting, to violate unintentionally all or many of the ordinances of such municipalities. The only way a motorist could safely drive through such districts without fear of penalty would be to reduce his speed to 20 miles per hour, the minimum speed to which a municipality may reduce the maximum speed of 30 miles per hour.

If you still feel such a bill should be presented to the General Assembly, notwithstanding the hardship such a law would impose on motorists, we shall be pleased to draft such a bill, but still feel it would have difficulty passing.

PARKING REGULATIONS PRESUMPTION

(*New Orleans Central Area Committee—S. R. D.—June 1, 1961*)

Your letter of April 26, 1961, requesting information relative to the constitutionality of an ordinance dealing with "presumption in reference to illegal parking" addressed to the Chicago Central Area Committee, which, in turn, forwarded the same to the Department of Streets and Sanitation, has been referred to the undersigned for reply.

Section 27-364 of the Municipal Code of Chicago provides as follows:

"Whenever any vehicle shall have been parked in violation of any of the provisions of any ordinance prohibiting or restricting parking, the person in whose name such a vehicle is registered shall be prima facie responsible for such violation and subject to the penalty therefor." This section has never been constitutionally tested.

In answer to your question 3, Section 26 of Article 2 of the Uniform Act regulating traffic on highways (Ill. Rev. Stat. 1959, ch. 95½, par. 123) gives municipalities the power to regulate standing or parked vehicles and traffic.

Although Section 27-364 has never been constitutionally tested, in *City of Chicago v. Crane* (1943), 319 Ill. App. 623, the court held that similar ordinance provisions were enforceable. In *City of Columbus v. Webster* (1960), 164 N. E. 2d (Ohio) 734, an ordinance of the City of Columbus providing that "the owner * * * in whose name such vehicle is registered shall be held prima facie responsible for such violation" was valid.

We hope the foregoing will be of assistance to you in sustaining the constitutionality of the parking section of the New Orleans Traffic Ordinance.

USE OF CHICAGO POLICE TICKETS

(*City Comptroller—E. W. P.—October 4, 1961*)

We have your letter of September 6, 1961, in which you request our opinion as to whether or not you should permit the University of Illinois police force to use your traffic tickets provided they place a decal with the University of Illinois letterhead over the caption of the Chicago Police Department. You advise that the State will pay the City for the cost of printing and that the taxpayer will not be subject to tax for the prohibitive cost of printing on a short order basis and that the Municipal Court will collect any revenue from violations for the City.

The processing is the same irrespective of whether the ticket is issued by the City Police Department or the University of Illinois police force. The tickets are issued in the name and by the authority of the People of the State of Illinois, and the University of Illinois police force as you state in your letter is an authorized state enforcing agency.

The only seal appearing on any of the traffic tickets or other paraphernalia is that of the Municipal Court of Chicago. Therefore, the use of the tickets in the manner described in your letter and with the decal showing the University of Illinois letterhead placed over the lettering of the Chicago Police Department does not alter the authenticity of the ticket and does not violate any of the provisions of the Municipal Code. We understand that the usage of

the tickets as outlined in your letter by the University of Illinois police force meets with the approval of all of the traffic agencies.

It is therefore our opinion that it is not unlawful for the University of Illinois police force to use the traffic tickets in the manner as described in your letter.

PARKING SUBSIDY BY PRIVATE AGENCY

(*Alderman, 13th Ward—G. F. V.—May 10, 1962*)

At the subcommittee meeting of May 8, you requested our written opinion regarding legality of the proposed contract for partial subsidy of a City parking lot by two institutions in the above cited area—Marquette National Bank and Chicago Savings and Loan Association.

It is our opinion that the agreement as drawn constitutes a legally valid and binding commitment by the parties thereto.

Sections 11-71-1 to -10, Chapter 24 (Ill. Rev. Stat., 1961) authorizes acquisition, construction and operation of motor vehicle parking facilities by municipalities. Section 11-71-1 (c) thereof provides that "Any municipality is hereby authorized to: (c) Enter into contracts dealing in any manner with the objects and purposes of this Division 71 * * *". The purpose of the subject contract is to guarantee minimum revenue from the operation of a lot or lots servicing the area of 63rd Street and Western Avenue. It is submitted that this objective is in direct conformance with the objects and purposes of Division 71 of the enabling statute.

We find in the agreement nothing repugnant to the terms of the Parking Facility Revenue Bond Ordinance (J. P. C. C., September 18, 1952, pp. 3139-67). The guarantee of minimum income from the operation of a parking lot tends to fortify the security of the bonds. The proposed contract does not, in our opinion, amend the Bond Ordinance.

Issuance of further bonds is not contemplated. Any sites acquired for the subject area are, we understand, to be financed through accumulated surplus revenue already appropriated. Financing new lots with this fund is expressly authorized under section 5.07 of the Bond Ordinance and Section 11-71-10 of the enabling statute.

You will note that the contract is in the form of an option. The City does not covenant to acquire, construct and operate such facilities. In this manner, no constraint is placed on the City Council's legislative prerogative to determine public necessity for such facilities. The City's sole required performance under the agreement is to make, or cause to have made, a traffic survey of the area to determine necessity and feasibility of proposed facilities.

That a parking facility is a public use is well established (*Poole v. City of Kankakee*, 406 Ill. 521, 1950, wherein the Parking Facilities Statute was upheld). That private interests may contribute to, and/or may benefit from, the support of public improvements without vitiating the public use character of such improvement is well recognized (*City of Chicago v. The Sanitary District of Chicago*, 272 Ill. 37, 1916; *Chicago B & Q RR Co. v. Naperville*, 169 Ill. 25, 1897; *Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 155, 1885; *Poole v. City of Kankakee*, supra).

Subject to the recommendation of the Independent Engineer, in accordance with section 7.02 of the Bond Ordinance, and determination by the City Comptroller that the Net Revenues derived from all parking facilities are not less than the amount required in section 5.01 of Article V of the Bond Ordinance, which is a condition precedent to acquisition of additional facilities (see the second full paragraph of section 5.01), we find nothing legally objectionable to the proposed contract.

STOPPING FOR DELIVERIES IN NO PARKING ZONES

(Chairman, Committee on Traffic and Public Safety—H. A. C.—May 31, 1962)

Your letter dated May 8, 1962, requests an opinion as to whether or not it would be legal for vehicles making pick-ups or deliveries to park in areas where "No Parking" signs have been erected, such as the top of the "T" intersections.

Section 19.01 of the Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat. 1961, chap. 95½, par. 116 (a) provides:

(c) "Park.—When prohibited means the standing of a vehicle, whether occupied or not, otherwise than temporarily for the purpose of and while actually engaged in loading or unloading."

Section 27-200 of the Municipal Code of Chicago has the same provision.

Section 90 of the Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat. 1961, chap. 95½, par. 187), provides:

"Parking prohibited in specified places. (a) No person shall park a vehicle, except when necessary to avoid conflict with other traffic or in compliance with the directions of a police officer or traffic control device, in any of the following places:—"

3. Within an intersection;
5. On a crosswalk;
6. Within 20 feet of a crosswalk at an intersection;
14. At any place where official signs prohibit parking.

Section 27-311 of the Municipal Code of Chicago has the same provisions.

Under the foregoing State and City regulations, it is permissible to park where "No Parking" signs are posted for the purpose of loading and unloading, except in the places designated in Section 90 of the Uniform Act Regulating Traffic on Highways and Section 27-200 of the Municipal Code of Chicago.

If a "T" intersection falls within such prohibitions, it is unlawful for vehicles to park therein for the purpose of making pick-ups or deliveries.

TRUCKS MAKING DELIVERIES

(American Oil Company—A. G. F.—September 17, 1962)

Your letter of September 13, 1962 is as follows:

"We respectfully request your opinion as to the legality of stopping a vehicle for the purpose of making a delivery on a street which is posted 'No Parking 7 to 9 A. M.'"

"This inquiry is due to the fact we are frequently requested to make deliveries to customers on such streets during the time mentioned above and are, therefore, anxious to know if our stopping for that purpose would constitute a violation of City Ordinance No. 27-308(a)."

Section 27-308(a) of the Municipal Code of Chicago reads as follows:

"27-308. Stopping, standing, or parking regulated.) (a) When signs have been erected upon any street indicating that stopping, standing or parking is prohibited during designated hours or prohibited for a longer time than is designated, no person shall park any vehicle on said street in violation of any such signs."

The language of this section is clear, and in our opinion no passenger vehicle may stop to load or unload passengers and no commercial vehicle may stop for the purpose of loading or unloading material during the hours designated on the signs.

Other sections of the Code which prohibit parking in certain areas provide some exceptions. Section 27-318 prohibits parking in the Loop area but permits passenger vehicles to pick up or discharge passengers provided such operations shall not exceed three minutes; commercial vehicles may stand for a period of time no longer than is necessary for the expeditious loading or unloading of materials, provided such loading or unloading of goods shall not consume more than thirty minutes. Section 27-316, which also pertains to the Loop area, provides that no person driving or operating any passenger vehicle shall cause or permit such vehicle to stand for a longer period of time than is necessary for the reasonably expeditious loading or unloading of passengers, nor shall any person owning or operating any commercial vehicle stand or stop such vehicle for any purpose during the hours of 4:30 p.m. to 6:00 p.m. on any street in the said Loop district.

Had the city council intended a similar exception to the limitations of Section 27-308(a), it would have been a simple matter to so state. Not having done so, we must assume that no such exception was intended.

USE OF STREETS FOR TRAILERS DURING STRIKES

(Superintendent of Police—A. F. G.—October 9, 1962)

We have your letter of October 4, 1962 which reads as follows:

A labor strike is in progress at Acme Industrial Company, 220 North Laflin Street, involving Local No. 310, United Automobile Workers Union.

Days after the strike was called, the union moved a small house trailer onto Laflin Street at 217 North, where it now rests. Acme Company inquired as to the legality of the trailer being parked 24 hours each day for several days prior to the inquiry. It was suggested that having a place where the pickets could be off the street when not active would lessen the problems and be beneficial to both labor and management. The company agreed not to press the matter.

The company now has requested the police to cause the removal of the trailer, citing the Municipal Code of Chicago—Chapter 27, Section 319, as basis of complaint. The United Automobile Workers Union was contacted and requested to move the trailer. They were reluctant to do so. It was decided to refrain from further police action pending receipt of an opinion from your office on the following questions:

1. Is it legal to park a trailer, truck, or bus on the street at a strike scene for an indefinite number of days, to be used for the purpose of expediting picketing?
2. Is the right to exercise the guarantee of free speech infringed upon by prohibiting the usage of such a vehicle in this manner?

Section 27-319 of the Municipal Code of Chicago provides:

No person shall stand or park any truck, tractor, semi-tractor, trailer or bus on any residential street for a longer period than is necessary for the reasonable expeditious loading or unloading of such vehicle, * * *.

No person shall stand or park any truck, tractor, semi-trailer, trailer or bus on any business street in the city for a longer period than sixty minutes or for such time as is necessary for the reasonably expeditious loading or unloading of such vehicle. * * *.

Any vehicle parked in violation of this section is hereby declared to be a nuisance which may be abated by any police officer by removing such vehicle to the city vehicle pound or to an authorized garage.

The parking of the trailer as described in your letter is clearly in violation of the section above quoted. We suggest you notify the owner or person in charge of the trailer to remove the vehicle and upon failure to do so to order the vehicle towed to the city pound or to an authorized garage as provided in the last paragraph of section 27-319, quoted above.

Our answer to question 1 is in the negative. Peaceful picketing in a labor dispute is legal, but no one has the right to violate the law to expedite that right.

Our answer to question 2 is also in the negative. Every one is vested with the constitutional right of free speech but no one has the right to violate the law in the exercise of that right.

REMOVAL OF PARKING TICKETS

(Chief Justice, Municipal Court—R. N.—January 16, 1963)

This acknowledges receipt of memorandum dated January 9, 1963 addressed to you by Commissioner John J. King stating difficulties which are encountered because of the practice of parking lot attendants of removing traffic violation notices attached to cars which had been parked on the public ways by the parking lot attendants without the knowledge of the driver of the vehicles, which memorandum was submitted by you to this department with the suggestion that an ordinance be prepared to make such practice illegal.

In our opinion no further legislation is necessary in this connection as Section 27-365(b) of the Traffic Regulations, which is a part of the section which provides for the tie-on tickets, reads as follows:

“(b) It shall be unlawful for any person, other than the driver of the vehicle to which such notice (parking violation notice) is attached, to remove the same from said vehicle.”

Section 27-363 provides for a fine of not more than \$200.00 for violation of this section.

CITY VEHICLE TRAFFIC REGULATIONS

(Commissioner of Streets and Sanitation—A. F. G.—February 8, 1963)

Your letter of January 31, 1963, is as follows:

"The Department of Streets and Sanitation has, as you know, incineration plants and disposal sites in various sections of the city and in transporting refuse to these various sites our equipment has been utilizing the modern means of transportation, namely, the Northwest, Congress and Dan Ryan Expressways to expedite time schedules.

However, there is some doubt as to whether our equipment should carry flags or flares when traveling these expressways. We have contacted Captain Sandgren of the Blue Island Police and Mr. Wojtasik of the State Highway Inspectors, as well as Mr. Dave Matchett, attorney for the State Highway Department regarding this matter and it was suggested we obtain an opinion from your department.

According to Section 121, A and B of the State Highway Ordinance, vehicles would not require flags or flares within a business or residential area—Mr. Matchett feels the three expressways are within the city limits and in business and residential areas and would not be required to carry flags or flares.

An immediate opinion from your office will be appreciated and your ruling in this matter will be binding on our equipment."

You refer to a provision in the statutes which requires motor vehicles of the second division to carry red flags and flares when operating upon a highway outside of a business or residential district. It also provides for the manner of their use in case of disability. This provision should be cited as, Paragraph 218 Chapter 95½ Illinois Revised Statutes or as Section 121 of "The Uniform Act Regulating Traffic on Highways."

You advise us that the incinerators and dumps to which your trucks transport refuse are all within the city limits. Your trucks use the Northwest, Congress and Dan Ryan Expressways all of which are in the thickly populated area of the city. Many hundreds of residences and business buildings were destroyed to provide rights of way for these expressways.

In our opinion, on those portions of these expressways which are inside a residential or business district, trucks operating thereon are not subject to the provisions of the statute cited above.

The cost of the flags and flares is nominal and it might be advisable as an extra precaution to carry them. If your department decides to do so we can see no legal objection thereto.

SERVICE DRIVE

(Commissioner of Streets and Sanitation—W. M. Z.—May 2, 1963)

On April 26, 1963 you requested an opinion from us regarding the possibility of declaring Ravenswood Avenue or sections of it a service drive. You further state in said letter as follows:

"Ravenswood Avenue is located immediately adjacent and parallel to the Chicago and Northwestern Railway embankment from approximately Wellington Avenue to approximately Touhy Avenue. The frontage on Ravenswood is mixed residential, commercial and industrial. Ravenswood carries less than 3,000 vehicles per day.

Predominantly industrial sections along Ravenswood generate employee parking problems. Parking demand is currently met by illegal angle parking on parkways along Ravenswood and adjacent local streets, and by overuse of residential streets in the vicinity for industrial parking.

We are proposing to meet industrial parking demands by developing excess Ravenswood right-of-way in appropriate locations for angle parking. To accomplish this proposal within existing City of Chicago ordinances, Ravenswood must be declared a service drive."

Our Municipal Code of Chicago Traffic Section 27-200 sets forth the definition of a service drive as follows:

"Service drive. A narrow portion of a public way open to vehicular traffic for the purpose of providing access to the front of abutting property between intersections and separated by physical means from through traffic, if the latter exists, on the same public way."

We have examined a plat of Ravenswood Avenue, a copy of which is attached hereto, and have also made a physical examination of the area. It appears that the railroad right-of-way cuts through said Ravenswood Avenue and at many places the streets do not cut through and are blocked to through traffic. It is our opinion that Ravenswood Avenue is a service drive and should be so considered by the Commissioner of the Department of Streets and Sanitation.

SYNCHRONIZATION OF TRAFFIC LIGHT WITH TRAIN SIGNAL

(Commissioner of Streets and Sanitation—E. J. K.—June 25, 1963)

Your recent memorandum to our office in regard to the above entitled matter raises the question of whether proposed traffic signal installation at the intersection of S. Racine Avenue and W. 47th Street should be synchronized with standard train approach signals used in connection with railroad tracks a short distance north of 47th Street crossing a private street which an uninformed person would consider as a continuation of S. Racine Avenue.

The question to be determined is whether section 26 of the Manual of Uniform Traffic Control Devices for Streets and Highways in the State of Illinois is applicable to this location.

Section 26 is as follows:

"Near Railroad Grade Crossings and Movable Bridges. Traffic Control Signals located at an intersection within 150 feet of a railroad grade crossing shall be interconnected with the standard train-approach signals by means of control equipment which will automatically cause the intersection traffic control signals to display a special railroad sequence. This special railroad sequence shall be determined by the physical characteristics of each individual grade crossing. Upon expiration of the special railroad sequence, the traffic control signals shall resume normal operation. Similarly, traffic control signals located on or near movable bridges, may be interconnected with the bridge gates, and with other signals which may be on the bridge. Interconnection of intersection traffic control signals with railroad grade crossing signals is subject to approval of the Illinois Commerce Commission".

Our opinion is that the manual refers to public streets and highways exclusively and would not cover the above mentioned location in connection with lights on a public street and lights at the railroad crossing of a private street.

An examination of the said location shows that a private street continuing north of W. 47th Street appears to be a continuation of S. Racine Avenue but the presence of open gates on both sides of the private street and an examination of the location in the City Map Department shows that S. Racine Avenue dead ends at W. 47th Street.

In view of this condition it is the duty of the City to discontinue recognizing said private street as a continuation of S. Racine Avenue and for the protection of the public and in the interest of the City the installation of traffic control signals at the intersection of S. Racine Avenue and W. 47th Street should be made as they would at a dead end street and vehicles operating on S. Racine Avenue be directed to go East or West on W. 47th Street. Those vehicles prevented from continuing to cross W. 47th Street on Racine Avenue and into the private street could detour from S. Racine Avenue at some street south of W. 47th Street and enter the private street while operating on W. 47th St.

The suggestions at the end of the last paragraph in regard to movement of traffic are inserted only more clearly to set out the legal position of the City. No doubt your department has had similar problems and will be able to solve this one as you have those in the past.

ORDINANCES IN CONFLICT WITH STATE LAW

(Superintendent of Police—A. F. G.—August 15, 1963)

In your letter of August 6, 1963 you refer to our letter of April 17, 1963 in which we held Section 27-215 of the Municipal Code of Chicago which prohibited U turns within 100 feet of an intersection, invalid, as being in conflict with the State law which permitted such turns everywhere except on curves and near the crest at grades.

You call attention to Sections 27-216 and 27-217 which prohibited U turns on boulevards and on certain loop streets, and ask our opinion as to their validity. In our opinion these two sections are invalid for the same reason we held Section 27-215 void, that they are in conflict with the State law.

We do not believe the legislature intended Section 63 of U. A. R. T. to apply to the larger municipalities of the State. That section is as follows:

“Section 63. Turning on curve or crest of grade prohibited. No vehicle shall be turned so as to proceed in the opposite direction upon any curve, or upon the approach to, or near the crest of a grade, where such vehicle can not be seen by the driver of any other vehicle approaching from either direction within 500 feet.”

There is no way the City of Chicago may prohibit U turns unless the statutes are amended expressly granting to the City power to enact ordinances prohibiting U turns which conflict with the provisions of said Section 63.

We suggest at the next session of the general assembly which convenes in January, 1965 that the said section be amended by adding at the end of the section the following:

“Provided, however, that the corporate authorities in municipalities of more than inhabitants may adopt an ordinance or ordinances regulating or prohibiting U turns in conflict with the provisions of this section.”

We see no reason why Sections 27-215-216 and 217 which are clearly invalid and unenforceable should remain in the Code, and send herewith for your consideration draft of a proposed ordinance repealing the said sections.

Be It Ordained by the City Council of the City of Chicago :

Section 1. Sections 27-215, 27-216 and 27-217 of the Municipal Code of Chicago are hereby repealed.

Section 2. This ordinance shall become effective upon its passage and due publication.

REGULATIONS GOVERNING TOWING VEHICLES

(Chief of Traffic—A. F. G.—December 10, 1963)

On December 6, 1963 Mr. F. O. Rieger, Station Manager for the Hertz company wrote us as follows :

Because of the fluctuations in business we must tow bar cars to and from O'Hare Field all through the week. Doing this we use only an authorized tow bar connection and do it in accordance with city codes and state statutes pertaining to this type of procedure.

Recently, for some reason, we have been stopped and in some cases ordered off the limited access highways of Chicago when using our tow bars.

After reading City Traffic Regulations, Code 27-266 and the amendment to this Code passed by the City Council of Chicago on Wednesday, May 8, 1963, we cannot find any reason for not being allowed to continue to use the limited access highways as we have previously done in the past.

Because time is such an important element and also cost, we are wondering if you can help clarify this situation. We are anxiously awaiting your reply.

On May 8 and again on September 11, 1963 section 27-266 of the Revised Traffic Regulations was amended by adding thereto paragraph (g) which now reads as follows :

(g) Whenever a tow truck picks up a disabled vehicle for the purpose of towing it away on any of the limited access highways within the city, it shall leave said highway at the nearest exit in the direction the towing vehicle is headed; and no tow truck towing a disabled vehicle shall enter a limited access highway.

Paragraph (g) specifically relates to tow trucks towing disabled vehicles; a vehicle towing another vehicle by a drawbar is covered by the regulations of paragraphs (a), (b), (d), (e) and (f) of the section. It is our opinion that the restrictions of paragraph (g) have no application to towing vehicles other than tow trucks towing disabled vehicles. We have discussed the matter with the bureau of street traffic which confirms the above interpretation and advises that it was not the intention of that bureau that vehicles engaged in towing by means of tow bars, other than tow trucks, be restricted.

Copy of this communication is being sent to Mr. Rieger.

SERVICE STREETS FOR ANGLE PARKING

*(Commissioner, Department of Streets and Sanitation—E. W. P.—
March 24, 1964)*

We have your letter of February 3, 1964, in which you advise that you were asked by the Mayor's Committee on Economic and Cultural Development to study industrial parking problems in the area bounded by Belmont, Elston, Wellington and the Chicago River. You state that the lack of off-street parking in this area and the absence of vacant land for parking development has resulted in considerable illegal angle parking on the right-of-way of streets.

You further advise that your surveys indicate that the local streets in the study area carry very small traffic volumes: 150 vehicles in 16 hours on Barry at Rockwell, and 650 vehicles on Rockwell at Barry, for example. You further say that the existent angle parking operation does not unduly interfere with vehicular or pedestrian movement.

You advise that it is your opinion that with slight modifications and formalization, angle parking in the rights-of-way of Rockwell from Wellington to Belmont, Nelson from Elston to Rockwell, Barry from Washtenaw to Rockwell, and Fletcher from Washtenaw to Rockwell could help solve a serious parking problem safely and efficiently.

You request our opinion concerning the legal ramifications of declaring these streets service streets so that angle parking can be permitted. A study of the zoning maps reveals that this area is almost entirely zoned for manufacturing purposes and much of the off-street parking is undoubtedly caused by automobiles of employees and management and prospective customers. It is our opinion, based on your survey and your considered thought as expressed in your letter, that this angle parking with slight modification would solve a serious parking problem safely and efficiently; that you could legally declare these streets service streets so that angle parking can be permitted.

TEMPORARY PARKING

*(President, Organization for the Southwest Community—L. H. G.—
April 22, 1964)*

We have your letter of April 15, 1964 and in answer thereto we direct your attention to the chapter on "Traffic", Chapter 27, Section 27-325, of the Municipal Code of Chicago which provides as follows:

"27-325. (a) No person shall stop, stand, or park a vehicle for any purpose or length of time other than for the expeditious unloading and delivery or pick-up and loading of materials in any place marked as a freight curb loading zone during hours when the provisions applicable to such zones are in effect. In no case shall the stop for loading and unloading of materials exceed thirty minutes.

(b) The driver of a passenger vehicle may stop temporarily at a place marked as a freight curb loading zone for the purpose of and while actually engaged in loading or unloading passengers when such stopping does not interfere with any motor vehicle used for the transportation of materials which is waiting to enter or about to enter such zone."

The regulation of traffic is in charge of Mr. Lloyd M. Johnson, Commissioner of Streets and Sanitation.

You also ask who is responsible for repairs to a building occupied by a party purchasing the home on a land contract sale. Our interpretation is that under those conditions both the owner and the contract purchaser are charged with the duty of making the necessary repairs.

PARKING IN A SCHOOL ZONE

(Principal, Gage Park High School—E. W. P.—December 4, 1964)

We acknowledge receipt of your letter dated December 1, 1964. You advise that the Gage Park High School is located on Rockwell, a one-way street, with traffic moving south and that at dismissal time parents and others drive to the school to pick up students. Between the hours of 1:30 and 3:30 P. M. there may be as many as ten cars standing at the curb in front of the school.

You ask specific questions as to whether (a) a person may stop in front of a school to discharge or pick up passengers; (b) for what duration may such a stop last; (c) must the engine remain running during the stop; (d) does a motorist break the law if he remains in the car with engine stopped; (e) what action should be taken by you, as principal, to correct any illegal phases of this situation; and (f) signs at curb state "No Parking," and would signs "No Parking, Standing, or Stopping" assist in solution of the problem.

It is our opinion that for the purposes of parents picking up students and also delivering them to the school it is permissible, in that regard, to stop in front of the school to discharge or pick up students and this would equally apply to the arrival of teachers or their return by car to their home. The duration of the stop should be reasonable, and a motorist would not break the law if he remained in the car with the engine stopped. Any legal phase of this situation in our opinion should be first reported to Hon. John T. Mehigan, Assistant Attorney, Board of Education, 228 N. LaSalle Street, Chicago, Illinois. The reason we make this suggestion is that there are also rules and regulations of the Board of Education with reference to the parking of cars in or near a school building.

Section 27-311 of the Municipal Code provides that it shall be unlawful for the operator of any vehicle to stop, stand or park such vehicle (13) at any place where official traffic signs have been erected prohibiting stopping, standing or parking. We believe the suggestion you make in your question (f) of signs "No Parking, Standing, or Stopping" may assist you in your problem.

INTERPRETATION OF "INTERSECTION"

(Commissioner, Department of Streets and Sanitation—R. G. M.—February 8, 1965)

We are in receipt of a letter dated December 4, 1964, from Alderman Robert L. Massey (36th Ward), requesting an interpretation of the word "intersection" concerning parking restrictions along the north side of North Avenue, between Austin Boulevard and Harlem Avenue, which is a part of his Ward.

The particular ordinance in question is 27-311 subsection 6 which reads as follows:

"Stopping, Standing or Parking Prohibited in Specified Places.

It shall be unlawful for the operator of any vehicle to stop, stand or park such vehicle in any of the following places, except when necessary to avoid conflict with other traffic or in compliance with directions of a police officer or official traffic sign or signal:

* * * * *

(6) Within twenty feet of a crosswalk at an intersection."

The area involved covers from 6000 West to 7200 West in the City of Chicago where, it appears at pages 69B and 70B of the Chicago Zoning Ordinance, there are 21 streets entering into North Avenue on the Chicago side, including Austin Boulevard and Harlem Avenue, and 20 streets entering into North Avenue from Oak Park on the south side of said street. The south side of North Avenue is part of Oak Park which is another municipal entity.

Our information indicates that the Street Department of the City of Chicago has interpreted the aforementioned ordinance to involve 41 different intersections in the said area and has, therefore, restricted parking on the Chicago side alone; in a dual capacity, rather than just considering the 21 streets pertinent to the Chicago side. This anomaly arises because all of the streets in the subject area do not intersect but "dead-end" into the center of an opposing block and this happens on both the Oak Park and Chicago sides of the subject street. Therefore, at each Chicago street, 80 feet of "no parking" is circumscribed instead of the usual 40 feet as provided by the ordinance. Thus, the question before us involves not the propriety of the ordinance as promulgated, but its application to the subject area as applied by the agents of the City of Chicago.

The character of the properties abutting the street are various types of commercial and business establishments including some of the most valuable property in the Chicago area. Among the establishments referred to are professional offices, service stations, retail stores, funeral homes as well as some light industry.

Investigation discloses that parking facilities are inadequate to accommodate patrons of the business and professional establishments. In many instances patients are forced to walk great distances to make their medical appointments, and elderly church members suffer from the distances they are necessitated to walk. There is some indication that the parking prohibition has resulted in a decrease in some of the businesses and professions in favor of the Oak Park side.

Our information further discloses that the restrictions applied to the Chicago side are not so regulated on the Oak Park side of the street. Investigation discloses that the presence of parked vehicles along the road cause no undue delays in the flow of traffic on the Oak Park side.

We further found that Section 1-1-5 of the Cities and Villages Act, Chapter 24 of the Illinois Revised Statutes, 1963, allows for corporate authorities to exercise jointly with other municipalities, any provision of the ordinance. In this regard Chicago and Oak Park have not entered into any such joint effort.

Parking in a city is a privilege and, therefore, subject to regulation by proper city authorities and the designation of parking in the street is within the power of a city to regulate. *Salomone v. The City of Canton*, 30 Ill. App. 2d 474; *Haggenjos v. The City of Chicago*, 336 Ill. 573; *John A. Tolman & Co. v. City of Chicago*, 240 Ill. 268, 88 N. E. 488, 24 L. R. A. (N. S.) 97, 16 Ann. Cas. 142.

However, any regulation of parking of vehicles on streets must be reasonable and a regulation forbidding the parking in certain streets or areas of vehicles used for the purpose of conveying passengers, goods, wares, customers or merchandise, is void, particularly when adjacent areas nearby or on the same street are not so restricted. Such enforcement of an ordinance

by signs under the color of right may not be affected by a municipality under its general powers.

We understand the difficulty arises out of the fact that in subdividing Oak Park and Chicago, the streets were not made to intersect; that they, for want of a better term, dead-end into the middle of an adjacent block and, therefore, many additional streets are imposed upon the question. However, Oak Park streets are not Chicago streets, for the Oak Park streets are an adjunct to a complete and separate entity.

If there is some unforeseen reason for this practice of using the 80 feet instead of the 40 feet between Chicago streets, we entertain no doubt that a proper ordinance may be drafted that will adequately regulate the traffic in accordance therewith and thereby properly promote public safety and welfare.

Poole v. Kankakee, 406 Ill. 521.

City of Bloomington v. Weirich, 381 Ill. 397.

It is sufficient here to say that the ordinance as applied to the subject area does not meet the required tests of reasonableness and constitutionality.

It is therefore recommended, as an opinion of this office, that the subject area be surveyed and regulations implemented in accordance with this opinion and the 80 feet between Chicago streets be restricted to the proper distances.

EXCEPTIONS FOR TRUCK WEIGHT REGULATIONS

(E. W. P.—I. C.—March 30, 1965)

In the memorandum of February 16, 1965, you requested an opinion relative to overweight trucks using 55th Street, a posted 5 Ton Limit Street, for the purpose of purchasing gas or other combustibles from a Local Gas Station. These trucks use 55th Street between Kedzie Avenue and Pulaski Road, there being no other means of ingress or egress.

You further state that the attorney for the Gas Company, Mr. John McCarthy, contends that there is a City Ordinance which allows these trucks to use the above street.

The question presented is whether trucks in excess of the posted weight limits of a street are allowed to use said street, for the purpose of purchasing merchandise, if they enter and leave such street at the nearest available entrance of ingress or egress.

Your memorandum does not identify the City Ordinance Mr. McCarthy relies on as authority for the trucks to exceed the posted weight limits on a City Street; there are exceptions to weight limitations, however, which are as follows:

“... except for the purpose of delivering or picking up materials or merchandise and then only by entering such street at the intersection nearest the destination of the vehicle and proceeding thereon no further than the nearest intersection thereafter...” Municipal Code of Chicago, Traffic, Chapter 27, Paragraph 337.

It is to be noted that the exceptions apply to vehicles which by necessity use the street to accomplish a particular purpose of either delivering or picking up merchandise. Those vehicles such as, Moving Vans or Cargo Trucks would by necessity use these streets or they would never be able to accomplish their purpose. Hence trucks delivering tank loads of gasoline or other com-

bustibles, or trucks picking up the same would clearly fall within the class of exceptions.

In the memorandum the trucks are using the street for the purpose of purchasing gas or other combustibles, and they are in our opinion outside the class of exceptions. The said trucks are not delivering or picking up cargo loads, nor must they of necessity use the particular street to accomplish their purpose of refueling.

The purpose of refueling is a business transaction which can be accomplished, without violating the City Ordinance, at other gasoline stations. The Courts here repeatedly held that no one has any inherent right to the use of the streets or highways for business purposes. *Jackie Cab Co. v. Chicago Park District*, 366 Ill. 474; *Chicago Park District v. Lattipce*, 364 Ill. 182.

“METER MAID” PROGRAM

*(Commissioner of the Department of Streets and Sanitation—
M. J. H.—July 21, 1965)*

In your letter of July 6, 1965, you ask five specific questions with respect to your contemplated Meter Maid Program. We are setting forth below the questions and our opinion with respect to each of them.

- (1) Whether or not the Bureau of Parking, through the bond issue, has authority to install a meter maid program (100 women).

The meter maid program is not expressly authorized by the Chicago Parking Facility Revenue Bond Ordinance (Coun. J. 9-18-52, pp. 3142-3167), hereinafter called the Ordinance. The program will have to be set up and justified as an expense of operation of the parking meters included in the “Parking Facilities” as defined in Article I, Section 1.01(n), in conformity with Article V, Section 5.01 and included in the operating budget as required by Article VII, Section 7.01, of the Ordinance.

- (2) Whether or not the Bureau of Parking has authority to put these meter maids on the payroll through a voucher.

The Bureau of Parking has no authority to employ meter maids until a fund is provided in the budget pursuant to Article VII of the Ordinance, against which vouchers may be drawn for the payment of the salaries.

- (3) Whether or not specific appropriations must be set up prior to the installation of the meter maid program, or whether the necessary amounts can be taken directly from the revenue fund, approximately \$40,000 per month.

Section 5.07 of the Ordinance specifies the distribution of Parking Facility Revenue Fund. A meter maid program can be financed only from the Operation and Maintenance Account. The cost of operation of the Meter Maid Plan will have to be included in the budget pursuant to Section 7.02 and 7.03 of the Ordinance as an operation “being in accordance with sound business principles and upon an efficient basis.”

- (4) Whether or not the Police Department can be notified to cease enforcement of parking meters so that funds which were previously appropriated to the Police Department can be directed to the meter maid program.

Section 5.06 covenants for the City that not less than 70% of all Parking Meter Revenues will be placed in the Parking Revenue Fund and that not

more than 30% of Parking Meter Revenues may be appropriated to the Police Department for enforcement of traffic regulations.

This provision of the Ordinance does not authorize the use of this 30% for any purpose other than the Police Department. If it is not appropriated to the Police Department, it remains in the Parking Revenue Fund, from which it may be used for the meter maid program only by being included in the budget as provided in the Ordinance.

The adoption of a meter maid program would not relieve the Police Department of the duty of enforcing traffic regulations. The meter maids would have no police powers, but only authority to supplement the police enforcement by the issuance of notices of violations to car owners.

The Police Department may not be notified to cease enforcement of parking meter ordinances.

- (5) Whether or not an ordinance is required to put said meter maid program in effect.

Section 27-365 of the Municipal Code of Chicago at present authorizes only police officers to attach to vehicles parked in violation of any ordinance notice to the registered owner to appear in court to answer to the violation. Section 27-365 should be amended to extend to meter maids the authority to attach such notices; such authority to be derived from new Section 27-416.1.

A new section to be designated as Section 27-416.1 should be adopted to authorize the Commissioner of the Department of Streets and Sanitation to designate female employees to be known as meter maids whose duties shall be to attach traffic violation notices to unattended and overparked vehicles in violation of the provisions of Chapter 27 of the Municipal Code.

ILLEGALITY OF "AUTO START"

(President, Stephen-William Co.—A. H.—December 5, 1966)

Your recent letter addressed to Mr. Raymond F. Simon, Corporation Counsel of the City of Chicago, has been referred to the undersigned for response.

You ask for an opinion with respect to the legality of a device manufactured by your Company called "AutoStart," purporting to be a thermostatically controlled mechanism used in a vehicle to prevent it from becoming inoperative in cold weather by starting the vehicle automatically when the engine block temperature becomes lowered and automatically turning off the engine upon reaching a certain temperature.

From the description contained in your letter it is apparent that the motor vehicle in which "AutoStart" is installed will be started and stopped in the absence of the person driving or in charge of said vehicle. Section 92 of the Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat. 1965, Ch. 95½, Par. 189) provides, in part, as follows:

"No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition and removing the key, . . ."

Section 27-268 of the Municipal Code of Chicago (Municipal Code of Chicago, 1939 as amended to and including January 1, 1966, Ch. 27) sets forth a substantially similar provision.

Since the engine of a motor vehicle equipped with "AutoStart" will be running in the absence of a person driving or in charge of it, we are of the opinion that any such person would be violating the foregoing provisions as presently written.

CHAPTER X—FINANCE

Section A. APPROPRIATIONS AND TAXES

DELINQUENT CHARGES

(City Council—M. S. H. & S. R. D.—May 5, 1961)

On March 29, 1961 the Supreme Court of Illinois reversed the decision of the Illinois Appellate Court and the judgment of the Circuit Court of Cook County, holding in effect that under the present ordinance after a delinquency of more than four months the city does not have the power to shut off water because of an unpaid water bill of a former owner.

The case arose as result of the efforts of the City of Chicago's Water Department to collect delinquent water rates by threat of shutting off the water supply.

One McNamara about March 26, 1954 bought a house at 5742 S. Sawyer Avenue, mortgaged to Lawn Savings and Loan Association. Between March 26, 1954 and October 29, 1956, McNamara incurred a water bill of \$41.20 which he did not pay. On the latter date, the Savings and Loan Association acquired a Master's deed through foreclosure of its mortgage. On December 28, 1956, the Association sold the property to Geno Cocanig who went into possession. The Water Department thereafter threatened to shut off the water to secure payment of the delinquent \$42.10. The Cocanigs paid all current charges during their occupancy of the property, but not the prior delinquency.

On May 28, 1958 the Cocanigs filed suit in the Circuit Court of Cook County for an injunction to restrain the City from shutting off the water supply to enforce collection of the delinquent rates. The Circuit Court dismissed the suit. The Appellate Court on April 14, 1960, affirmed the judgment of the Circuit Court.

The Supreme Court held in substance that, while the ordinances providing for the collection of water rates are valid, the ordinances did not authorize the collection of delinquent rates by shut-off after the expiration of more than 18 months after the accrual of the delinquency. The Supreme Court based its opinion on the following language of Section 185-46.1 of the Municipal Code of Chicago:

"* * * provided, that if more than four months shall have elapsed since the assessed rates or rents shall have become due and payable, the water supply of such premises shall not be cut off unless suit shall have been commenced or a claim for lien shall have been filed as provided in section 185-45 and 185-46 of this code, or unless the person liable for the unpaid water bills is the owner, occupant or person in possession or in control of such premises when the supply of water is cut off."

The Court's decision calls attention to the fact that in some respects the operations of the Water Department are not tailored to fit the collective provisions of the existing ordinance.

In order to bring the collection practices of the Water Department within the scope of the Court's opinion, where a new owner of the property

is involved, the shut-off must be exercised within four months of the bill's delinquency or Section 185-46.1 should be amended by eliminating the proviso quoted above, so that the section would read as follows:

"185-46.1. The remedy by enforcement of the lien for unpaid water bills and charges as provided in sections 185-45 and 185-46 of this code shall not be exclusive of any other legal remedy to collect the amount due and unpaid for water consumed or furnished to, or water service installed or disconnected for, the person liable therefor. The water supply of the premises against which assessed rates or rents remain unpaid may also be cut off as provided in section 185-44 of this code."

We are enclosing a copy of the Court's opinion.

EXEMPTION FOR CONSTRUCTION MATERIALS TRANSFERRED TO CITY

(Purchasing Agent—City Comptroller—September 6, 1961)

The State of Illinois Department of Revenue has made the policy decision that the various State, Municipal and County Retailer's and Service Occupation Taxes and Use Taxes do not apply to the proceeds of sales of materials transferred to City in construction under subject contract specifications. The Department's letter affirming this decision is enclosed.

Inapplicability of tax is predicated on the theory that since this contract had been financed pursuant to water certificates already authorized long prior to the effective date of the tax, the contract is, for the purpose of these taxes, completed. Note, however, that exemption is given this contract only, but that subsequent contracts financed by the same authorization may be exempted upon submission of same for the Director's approval.

An addendum should be issued, accordingly, since, we are informed, these specifications are now in advertisement. Such addendum should take substantially the following form:

* * * * *

ADDENDUM NO. 1

A) Delete all reference to taxes and insert the following:

TAXES

Federal Excise Tax does not apply to materials or services purchased by the City of Chicago.

Bidder is notified that the proceeds of sales to bidder of materials which will be transferred to City in the construction contemplated by this contract are exempted from the following taxes:

1. Illinois Retailers' Occupation Tax
2. Municipal Retailers' Occupation Tax
3. Illinois Service Occupation Tax
4. Municipal Service Occupation Tax
5. Illinois Use Tax
6. Illinois Service Use Tax
7. County Service Occupation Tax
8. County Retailers' Occupation Tax

This exemption applies to all levels of the purchase of materials, i.e., purchases by successful bidder or subcontractors from materialmen or by servicemen of contractor or subcontractors from suppliers.

Successful bidder and its subcontractors will be issued a letter of exemption which may be used in filing tax returns under one or more of the above cited taxes in support of deductions from gross receipts taken on such returns for the proceeds of this contract, and/or which shall be used by successful bidder and its subcontractors in support of affidavits of exempt-sale issued to materialmen when purchasing materials which will be transferred to City in the construction herein contemplated. The form of such affidavits shall include a description of the construction project, the contract number, and the specifications number, and shall be subject to the approval of the city comptroller.

Therefore, the prices quoted herein shall be conclusively presumed to exclude the amount of any of the above cited taxes.

City undertakes to reimburse successful bidder for any amounts which the State of Illinois, Department of Revenue may assess in disallowance of said exemption. Note, however, that the exemption applies only to materials sold or transferred to City during construction, and not to purchases by contractor of equipment or tools to be used and retained by contractor.

The price or prices quoted herein shall include all other Federal, State and local, direct and/or indirect taxes which apply.

The prices quoted herein shall comply with all Federal Laws and Regulations.

The letter of exemption referred to in the addendum should be in the following form:

(City Comptroller's Letterhead)

LETTER OF EXEMPTION

.....
.....
.....

Dear Sir:

Be advised that the proceeds of the purchase of construction materials to be transferred to the City of Chicago pursuant to Contract No. under Specification No. 80.391-61-1 being for construction of Pumping, Chemical, and Administration Building, Central District Filtration Plant, are exempted from State of Illinois, Municipal and County Retailers' Occupation and Service Occupation Taxes, and Illinois Use and Service Use Taxes.

Very truly yours,

City Comptroller

Approved:

CORPORATION COUNSEL

ACCEPTING GRANTS

(Ford Foundation—J. C. M.—October 17, 1961)

We are advised by the Department of City Planning of the City of Chicago that the City proposes to enter into a contract with the Armour Research Foundation to execute a study on the "Evaluation of the Techno-Economic Potential of Metropolitan Chicago." We are further advised that the total cost of this study will be \$115,000; that the Ford Foundation will make a grant to the City of Chicago in the amount of \$57,500 for the implementation of this joint Department of City Planning-Armour Research Foundation Study Proposal.

We have been requested by the Department of City Planning to advise you as to whether or not the City of Chicago may legally accept such a grant from the Ford Foundation.

Under Chapter 24, Section 11-12-4 of the Illinois Revised Statutes, municipalities may accept grants from public agencies and private persons or corporations or foundations for planning purposes generally or for planning specific projects. It is, therefore, our opinion that the City of Chicago may officially accept such a grant from the Ford Foundation for this research study.

MOTOR FUEL TAX

(Mayor—I. C. M.—October 24, 1961)

In Chapter 120, Paragraph 426a (§ 10a), it is provided as to the use of motor fuel tax funds by municipalities:

"Money allotted to the several municipalities shall be used for one or more of the purposes stated in Sections 10a.1 to 10a.13, inclusive." 426a.9 (§ 10a.9) of the said statute provides:

"The payment of any municipal indebtedness which has been or may be incurred in the completion of any improvement or maintenance described in Sections 10a.1 to 10a.13, inclusive, or in the payment of engineering costs in connection therewith." 426a.17 (§ 10a.17) of said statute further provides:

"Payment of money to the municipality for maintenance, engineering, construction, or reconstruction performed by the municipality, or for the payment of indebtedness shall be made in accordance with the needs of the municipality. Payment for construction or reconstruction performed by contract shall be made to the municipality upon approval of the contracts by the Department of Public Works and Buildings."

While the Revenue Bond Ordinance and the bonds provide that the revenue bonds shall not be considered an indebtedness within the constitutional or statutory limitations, it is our opinion that it is a municipal indebtedness within the general language used in Section 10a.9 above set forth.

While the Revenue Bond Ordinance and the bonds provide that the motor fuel tax funds have the purpose of the payment in part or in whole of a municipal indebtedness, that the City has the authority and can borrow

from the motor fuel tax funds allotted to and unexpended by the City of Chicago for the purpose of paying interest on the Chicago Skyway Bond issue.

The Attorney General of the State of Illinois has ruled in two opinions, No. 2875—October 30, 1930 and No. 3287—June 23, 1931 that (a) a county may use motor fuel tax funds to retire bonds issued for the purpose of constructing State aid roads and (b) a county may issue bonds to pay a tax deficiency in the county highway fund.

These opinions were written prior to the enactment of the 1959 laws which spell out the specific purposes for the use of motor fuel tax funds and established a public policy for the State in connection with the distribution and use of motor fuel tax funds.

We attach hereto a form of a proposed ordinance to be considered for this purpose.

SALES TAX—PURCHASER DEFINED

(Assistant Purchasing Agent—J. E. S.—November 28, 1961)

Your inter-office memorandum of November 6 requests our analysis of and answers to questions presented in the letter from Epsco, Inc. dated October 31.

Epsco's letter implies that Epsco is not an Illinois Corporation, that it maintains no office in Illinois, and that no agents represent that corporation in this state. Presuming this, the sale by Epsco is an interstate sale.

Although no information in this regard is given, we presume that the purchase from Epsco involves a direct purchase of tangible personal property—not a service with transfer of personality incident thereto—and we presume further that the requisitioning agency of the city is not one of those heretofore designated exempt in the opinion of this office.

Subject to the foregoing presumptions, it is our opinion that the only Illinois "sales" tax involved in subject transaction is the Use Tax. This tax is imposed on *purchaser* the City—at the rate of 3½%. Provided, that Epsco, Inc. does not and need not maintain a continuing registration under Sections 2 or 6 of the Use Tax Act, Epsco is not required by law to collect this tax from the City and remit same to the State. However, if Epsco does not so collect and remit, the City is required to remit the tax directly.

If the subject purchase order recites nothing more than "All Sellers to the City of Chicago are now subject to Retailer's Occupation Tax, Use or Service Tax" and, "All bids must show all applicable taxes " * * " as indicated in Epsco's letter, Epsco should be paid the amount of the tax only if evidence from the state of Epsco's authority to collect the tax is presented.

In this regard see our many opinions regarding this matter heretofore rendered. The clauses recommended for insertion as contained in our letter of September 25 are self-explanatory in this regard.

It is apparent from the many inquiries concerning Use Tax that perhaps procedure for payment of this tax to non-registered out-of-state vendors should be reviewed. As I recall, it was decided that, as a matter of policy, we would by contract require such vendors to collect this tax from the City and pay it to the State—thus relieving City of the burden of filing tax returns. Suggested procedure we believe protects the City from liability for the tax, i.e., through separate statement of tax, evidence of authority from the State, presented by vendor, to collect the tax, etc. However, if you would care to discuss this matter further, please advise.

FLUORINE EXEMPTION FROM OCCUPATIONS TAX

(Purchasing Agent—C. F. V.—December 19, 1961)

Returned herewith in triplicate pursuant to your recent request is the above cited contract No. 22868.

Because fluorine is a nutrient, effective upon and intended for consumption by users of water, it becomes a part of the water and is not consumed in the process of water purification and production. Consequently, in our opinion, the subject purchase by the city is not a purchase at retail, but a purchase for resale falling within the interpretive description of same contained in Article 2, Paragraph 3 of the Rules and Regulations of the State Department of Revenue.

Therefore, neither the vendor nor the city incur liability for Occupation or use tax respectively under the subject contract. Bids should be evaluated and the contract awarded, on a tax-inclusive basis, and a certificate of resale should be issued to successful low bidder.

The certificate of resale, in letter form, may be phrased substantially as follows:

Gentlemen:

This will certify that the purchase of
from your firm by the City of Chicago under contract number
is intended for resale. The City of Chicago maintains no permanent
registration with the State of Illinois Department of Revenue under
the Retailers' Occupation Tax Act.

Subject to the foregoing, and provided that subject vendor remains low bidder when bids are evaluated on a tax-exclusive basis, it is our opinion that this will be a valid and binding contract when signed by the Purchasing Agent, the City Comptroller and the Mayor.

Our approval as to form and legality is indicated thereon.

USE TAX ON CITY SALES

(Commissioner, Department of Water and Sewers—C. F. V.—December 27, 1961)

Your recent letter requests our opinion concerning imposition of relevant Illinois Occupation and Use Taxes as affecting purchases and sales of the Water Distribution Division's Stock Account.

Specifically, your letter requests answers to the following questions:

1) Should any Use Tax be charged when sales are made to other than City departments?

2) If so, in what manner, and to whom, would monies so collected be forwarded to the State of Illinois?

3) When the State of Illinois refunds to the City its part of the collected Use Tax, does the Water Fund obtain that portion which the Water Fund has paid to the various vendors?

Our opinion, as follows, considers these problems in order of presentation.

1) Use Tax should not be added to the price of Stock Account items when resold to other than City Department pending our deliberations with the State Department of Revenue.

2) If it should appear that tax must be collected and paid on these sales, we shall supply information relating to application for registration with the State and to preparation of tax returns.

3) Use Tax collected from the City by vendors on Stock Account purchases is not returned to the City. The major portion of Use Tax is deposited in the State Treasury with a percentage for the Common School Fund in which the City shares indirectly. Hence, the Water Fund would not be reimbursed for amounts of Use Tax paid therefrom.

If vendors shift forward to the City .5% Municipal Retailers' Occupation Tax—which is a tax on vendor, not vendee—the amount of same should be considered part of the net cost to the City, indistinguishable from other overhead items. Water Fund money, from which is paid the total price, loses its character as Water Fund money upon disbursement to vendor. Thus when vendor pays the Municipal Tax to the State and when the State transmits it to the City, such amounts are not necessarily returnable to the Water Fund.

As soon as we receive information from the State regarding problem (1) above, we will contact you.

OCCUPATION AND USE TAX EXEMPTIONS

(Mobil Oil Company—Purchasing Agent—April 17, 1962)

This is to certify that all purchases by the City of Chicago for the use of and in behalf of the following listed institutions are exempted from relevant Illinois State and Local Occupation Taxes and Use Tax on the grounds that such institutions qualify as charitable institutions under the pertinent exemptive categories of the named statutes:

- (1) Chicago Public Library
- (2) Municipal Tuberculosis Sanitarium
- (3) Chicago Contagious Disease Hospital
- (4) Chicago Alcoholic Treatment Center

EXEMPTIONS FROM RETAILER'S TAX

(H. B.—C. F. V.—May 16, 1962)

Your recent letter requests a statement of the City's position regarding application of Chicago's Municipal Retailers' Occupation Tax to sales by Chicago based vendors to the City of Chicago. You indicate it to be your understanding that the tax does not apply if the seller is located outside of the City but that this office has not yet ruled on the sale within the City.

We have taken the following position:

1. Vendors located within the City of Chicago, when selling to the City and when such sale is not exempt for other reasons, incur liability

for Chicago's Municipal Retailers' Occupation Tax (MROT). Such amount may, but need not be shifted forward to the City as part of the net selling price. Inasmuch as there is no complementary Municipal Use Tax vendors are not required to collect (or shift forward) the amount equal to MROT from the City as purchaser. Because the MROT is a tax on vendor, not on the transaction or the vendee, it cannot be said that the City is taxing itself. The City is not authorized by the enabling MROT Act (Section 8-11-1, Chapter 24, Ill. Rev. Stat., 1961) to exempt the proceeds of sales to itself.

2. Vendors located outside the City of Chicago but within the State of Illinois, when selling to the City and where such sale is not otherwise exempt, incur liability for either the County or Municipal ROT in effect in said county or municipality where such vendors are located. We are not aware of any Illinois county which does not impose this tax. If the municipality of locus does not exact the tax, the county tax applies. These vendors may, but need not shift forward such tax to the City of Chicago on sales to the City.

3. Out-of-State vendors to the City of Chicago who do not incur liability for Illinois State Retailers' Occupation Tax by virtue of current "minimum contracts" requirements, do not incur liability for Chicago's MROT. However, in such instances, Illinois Use Tax—equal in amount to State ROT—is incurred by the City, is considered in evaluating bids and is collectible by such vendors required or authorized to collect such tax under section 6 of the Use Tax Act (section 439.6, Chapter 120, Ill. Rev. Stat. 1961).

TAXES APPLICABLE ON LEASE AGREEMENTS

(Purchasing Agent—R. L. H.—May 7, 1963)

We are in receipt of your letter of May 1, 1963, relating to Federal Excise Tax applicability to your leasing a Flexowriter machine from Pioneer Leasing Company.

We have examined copies of the correspondence submitted with your letter, Pioneer's leasing proposals for the original three machines and for the fourth one referred to in your instant letter of inquiry, and have also discussed the matter with the Internal Revenue Service and Mr. Murphy of Pioneer Leasing Company.

It is our opinion that there is nothing legally objectionable with the leasing proposal as it is presently constituted even though a 6% Federal Excise Tax and a 4% Illinois and Chicago Retailers and/or Use Tax are included in the base price upon which the monthly rental is calculated. The base price quoted to the City has been represented as being Pioneer's actual cost, and if the same is factually correct, it is definitely proper that the rental and the sale price to the city if the option to purchase is exercised be the cost of the machine to our supplier. The aforementioned taxes are not being charged to the city as taxes, which would be improper due to our tax exempt status, but are properly being charged as part of the lessor's cost of the machine leased to the city.

It is our understanding that the Federal Excise Tax was not included in the lease price base of the first three machines due to a lack of understanding on the part of Pioneer as to the liability therefor under the Rules of the Internal Revenue Service.

The Rules and Regulations of IRS provide that sales to governmental units are exempt from the excise tax. The regulations also provide that in the event a sale is made to a third party for leasing to a governmental

unit with the option to purchase, if the option is exercised, the transaction will be treated as a direct sale from the manufacturer to government and therefore tax exempt. The difficulty that arises, however, is that the tax must be paid by the vendee of the manufacturer at the time of the original sale, and since there is only a three-year period during which refund claims may be honored, the city must exercise the option to purchase within this time for the tax exemption to be operative.

Insofar as the lease agreement for the first three machines is concerned, in the event the city exercises its option to purchase within the three-year period, an exemption letter to Pioneer will serve as their basis for recovery of the Federal Excise Tax paid by them and not in turn charged to the city. Insofar as the current machine is concerned, since an Excise Tax of \$213.30 is indicated as being part of the cost of the machine, in the event the city chooses to exercise the purchase option within three-years, we can expect a refund of this sum from Pioneer in exchange for an exemption certificate.

If you have any other questions in this matter, please feel free to contact us at any time.

OTHER STATE'S INCOME TAX ON WAGES EARNED IN ILLINOIS

(Commissioner of Health—E. W. P.—October 23, 1963)

We have your letter in which you advise that certain staff members of the Board of Health have been advised by the State of Wisconsin, Department of Taxation, that they are subject to Wisconsin income tax on wages. These are members of the dairy inspection section assigned to inspect farms and milk plants in Wisconsin producing and processing milk intended for distribution in Chicago and hold Board of Health permits.

You advise that the staff of the dairy inspection section assigned currently in Wisconsin numbers 21 men, all of whom are legal residents of Chicago. However, thirteen members of the group, because of convenience and the economies effected in saving time and travel, maintain temporary residence in Wisconsin. The remaining eight men work during the week in Wisconsin, returning to Chicago each week-end and it is in the interest of this last group of eight that your communication is concerned.

You call our attention to the following data:

All salaries and maintenance are paid by the City of Chicago. in this matter. We have before us Chapter 71 of the Wisconsin statutes of a service requested by the individual farms and plants so that milk produced and processed by these farms and plants may be approved for distribution to Chicago pasteurizing plants.

There are no licenses, fees or other charges paid to the City of Chicago, or Board of Health, for the services performed in the manner of inspection, testing and approval of the various milk supplies.

Based on verbal opinions rendered by members of the Wisconsin Department of Taxation, the tax payment incumbent upon these individuals will amount to between \$150 to \$200 per year for each year of the period from 1959 to 1962.

You request our opinion concerning what action should be followed in this matter. We have before us Chapter 71 of the Wisconsin statutes of 1961 relating to the subject matter of your letter, entitled "Tax On Incomes For State And Local Revenues."

Section 71.01 relating to the income states as follows:

"... For the purpose of raising revenues for the state and the counties, cities, ... there shall be assessed, ... and paid a tax on all net incomes ... by every person residing within the state ... and by every nonresident of this state, upon such income as is derived from property located or business transacted within the state, and also by every nonresident ... upon such income as is derived from the performance of personal services within the state, except as hereinafter exempted. Every ... person domiciled in the state shall be deemed to be residing within the state for the purposes of determining liability for income taxes ... This section shall not be construed to prevent or affect the correction of errors or omissions in the assessments of income for former years ...

(3) Exempt Income. There shall be exempt from taxation under this chapter income as follows, to wit:

(a) Income ... all religious, scientific, educational, benevolent ... or associations of individuals nor organized or conducted for pecuniary profit. ...

(b) Income received by the United States, the state and all counties, cities, villages, school districts or other political units of this state.

(c) Income of co-operative associations or corporations engaged in marketing farm products for producers, which turn back to such producers the net proceeds of the sales of their products; provided, that such corporations or associations have at least 25 stockholders or members delivering such products and that their dividends have not, during the preceding 5 years, except 8 per cent per annum; also income of associations and corporations engaged solely in processing and marketing farm products for one such cooperative association or corporation and which do not charge for such marketing and processing more than a sufficient amount to pay the cost of such marketing and processing and 8 per cent dividends on their capital stock and to add 5 per cent to their surplus.

(d) ...

(dm) Compensation received from the United States for active service as a member of the armed forces thereof and compensation received from the United States for services as a reserve member of the armed forces thereof in the years 1950, 1951 and 1952, and the first \$1,500 of such compensation received in 1957 and 1958.

The Act provides in discussing gross income; inclusions, and exclusions, that included are gains, profits or income of any kind derived from any source whatever, except as exempted, and under "Exclusions", sub-paragraph (f) provides:

With respect to natural persons domiciled outside Wisconsin who derive income from the performance, on or after January 1, 1961, of personal services in Wisconsin, such income shall be excluded from Wisconsin gross income to the extent that it is subjected to an income tax imposed by the state of domicile; provided that the law of the state of domicile allows a similar exclusion of income from personal services earned in such state by natural persons domiciled in Wisconsin, or a credit against the tax imposed by such state on such income equal to the Wisconsin tax on such income.

The State of Wisconsin is, of course, very much concerned with the welfare of those engaged in its state in marketing the milk produced and processed and for its distribution to Chicago pasteurizing plants, which fact is emphasized by Section 71.01, subsection (c) of the Wisconsin statute.

You advise that the nature of the service rendered is requested by the individual firms and plants so that the milk produced and processed may be approved for distribution to Chicago pasteurizing plants.

The other pertinent section, which we believe is vitally important in claiming exemption, is contained in Section 71.01, which imposes the tax upon such income as is derived from property located or business transacted within the state. The business here which in our opinion applies equally to all twenty-one men is not derived from property located in the state and the business transacted derives its locale from Illinois and is not transacted within the State of Wisconsin. The fact that these men are in Wisconsin is for the convenience of the public as well as the farm industry of the State of Wisconsin. This is a personal service to them and the property interest is in Illinois in the marketing of Wisconsin milk products. The Corporation Counsel does not have authority under the Statute or Municipal Code to engage in this controversy. In the event that these employees of the Health Department wish to contest the demand being made by Wisconsin in the collection of this tax, it will be incumbent upon them to retain their own private counsel.

TELEPHONE COMPANY'S TAX LIABILITY

(First Deputy Comptroller—J. J. D.—February 20, 1964)

You request a written legal opinion as to whether or not the deductions and omissions made by The Illinois Bell Telephone Company (Company) from gross revenue in arriving at the 2 per cent utility tax, for the three years December 31, 1960-1-2, as disclosed by Wolf and Company Report (Report), are subject to the tax.

The pertinent provisions of the Ordinance, are:

"Gross receipts" means: "The consideration received for transmission of messages and for all services rendered in connection therewith valued in money . . . and shall be determined without any deduction on account of the cost of transmitting said messages, the cost of material used . . . or any other expenses whatsoever. (132-30)

"Taxpayer" is defined as a person engaged in the business of transmitting messages by means of electricity; (132-30). The ordinance provides that the term "transmitting messages", in addition to the usual and popular meaning of person to person communication, shall include the furnishing for a consideration of services or facilities (whether owned or leased), or both, to persons in connection with the transmission of messages, where such persons do not in turn receive any consideration in connection therewith but shall not include such furnishing of services or facilities to persons for the transmission of messages to the extent that any such services or facilities for the transmission of messages are furnished for a consideration, by such persons to other persons, for the transmission of messages. (132-30)

The tax is imposed upon all persons engaged in the business of transmitting messages by means of electricity at the rate of 2 per cent of the gross receipts from such business after December 31, 1955 originating within the corporate limits of the city, subject, however, to all the provisions, conditions and limitations in section 23-113 of the Revised Cities and Villages Act, authorizing this tax, and to all provisions, conditions and limitations in this ordinance consistent with the powers conferred upon the city by said section and other relevant law."

The issue submitted by your letter was the subject of an opinion bearing date of July 1, 1957 by Mr. Joseph F. Grossman, Special Assistant

Corporation Counsel, and a reply thereto from the attorneys for the Company, under date of March 24, 1958.

The Report, Schedule 1, shows a "Summary of Deductions from Gross Billings" for the three years ended December 31, 1962. We shall discuss these deductions in the order in which they appear in that schedule:

Interstate Messages:

Item 1 of the deductions is captioned "Interstate and originating outside of Chicago"; among the larger items shown on this page for the period referred to, are:

- | | |
|-----------------------------|------------------|
| (1) "Message Charges | \$ 10,337,836.63 |
| (2) "Message Tolls | 236,687,103.79 |
| (3) "Total deductions | 252,818,880.40." |

We assume that the items referred to, along with others on that sheet, are involved in the transmitting of interstate messages originating in Chicago. We further assume that the Company has deducted these items on the theory that inasmuch as interstate messages are involved, the revenue received therefrom is exempt from the utility tax. This issue was discussed in Mr. Grossman's opinion, as follows:

"In my opinion, the constitution and statutes of the United States permit the imposition of a State or local tax on transactions, in interstate commerce, involving intrastate service, and there is nothing in Section 23-113 or in the ordinance relating to the subject which relieves the company from its utility tax burden on revenue which is fairly apportioned to the service rendered within this State; (citations furnished).

An investigation of the law up to the present time, confirms the Grossman opinion; and, we are not advised of any fact that would change it.

The Company further advances the argument that because no apportionment of billings for interstate messages is maintained, and no standard for making apportionment is provided by the General Assembly, any administrative effort to assume the basis for such an apportionment would be invalid. The Company does not cite authorities to support its conclusion and we must, therefore, assume there are none. It is significant that the Company does not claim such an apportionment is unattainable. It might very well be that the Company records, at the present time, show such an apportionment and the auditors for City should be directed to conduct a further investigation to determine this fact. The amount involved justifies such an investigation.

It should be noted, further, that the Company states that the Grossman opinion concedes "the tax cannot validly be applied to *unapportioned* revenues from interstate messages". While Mr. Grossman's opinion may be interpreted as holding that the tax cannot validly be applied to *unapportioned* revenue from interstate messages, it is clear that this opinion sustains the tax as applied to "revenue which is apportioned to the service rendered within the State". The City is only seeking the payment of the tax, as applied to the intrastate portion of this revenue.

We do not disagree with the Company's contention that the revenues "imposition of a tax on the intrastate portion of *interstate* revenues would increase the rates for *intrastate* telephone service". The Statute permits the Company to pass on to the subscriber the expense incurred by reason of the tax imposed under Section 23-113. This Statute is the authority for assessing the tax here under consideration, and becomes automatically effective upon the Utility filing a schedule of rates with the Illinois Com-

merce Commission, in conformance with that section of the Statute; (Sec. 36, Chap. 111½; Ill. Rev. Stat. 1963).

Non-Message Transmission—Unenergized Circuits

The Company's letter states that this revenue is from the lease of unenergized circuits for use by others. We are of the opinion that the Company is entitled to claim this revenue as tax exempt. Mr. Grossman's opinion arrived at a similar conclusion.

However, it is noted that data should be obtained concerning the Lessees involved, their business and the amount of revenue represented in each instance. Any Lessee of the Company's facilities who transmits messages through these facilities, is a "taxpayer", as defined in the ordinance; and, is subject to the tax on the gross receipts from the transmission of such messages and for all services rendered in connection therewith.

Audio and Video Transmission

The Company's letter states that the revenue under this heading consists of unapportioned billings from transmission of interstate messages and from non-message transmission. As to that portion of the revenue involving unapportioned billings from transmission of interstate messages, it is our opinion that the procedure outlined under the caption "Interstate" should be followed in this instance by a proper apportionment of interstate and intrastate revenues, the latter sum being subject to the tax.

Intrastate Services Billed to the U. S. Government

Exhibit A of the Report, shows the following amounts as billed directly to the U. S. Government:

<u>1960</u>	<u>1961</u>	<u>1962</u>
\$1,281,529.50	\$1,363,866.76	\$1,505,693.01

making a total of approximately \$4,150,000 over the three year period. The Company's letter states that, "Since the U. S. Government is not a 'person' as defined in Section 132-30 of the Municipal Code, these revenues are not subject to the tax".

The 1956 Wolf and Company Report contains a statement that, the Company charges the Chicago utility tax to the U. S. Government accounts; and that the Company considers the charge a "loading factor" to compensate for local coin revenue and other revenues that are taxable to the Company but on which the Company is unable to collect the tax. The Grossman opinion answers this argument by pointing out that:

"The tax imposed by the ordinance is not a tax on 'receipts', nor is it a tax on the subscriber or user of the company's service such as the U. S. Government or persons using coin box public telephone facilities. It is a tax on all persons engaged in the business of transmitting messages by means of electricity, measured by the gross receipts of such business."

This Report further states that the other public utilities, the examination of whose returns is included in the Report (1956), include and pay tax on revenues from services furnished the United States Government.

The current Report, dated September 4, 1963 contains a statement that, "We were informed that the company collects the additional charge on this revenue from U. S. Government". The accountant (Wolf and Company) who conducted the current examination, informed us that The Peoples Gas Light and Coke Company collect a similar tax from the U. S. Government and pays the same to the City under its tax obligation. It is inconsistent

for the Company to take the position that this tax is not covered by the Code, while at the same time it proceeds to collect it from the U. S. Government and refuses to pay the same to the City. The Company apparently has been the recipient of the tax paid by the U. S. Government since the effective date of the ordinance (December 31, 1955). An accounting should be had to determine the amount of the tax so collected and a demand made upon the Company that this sum of money be paid to the City of Chicago.

- A. *Intrastate sent collect messages from Chicago served phones located outside Chicago, etc.*
- B. *Revenue from Chicago calls to Chicago served phones outside Illinois.*

These items were not considered in Mr. Grossman's opinion nor the Company's letter, but we assume from the context of the caption that this revenue originates in connection with messages from Chicago.

Caption "A" apparently is revenue produced by messages originating within the City and is, therefore, in our opinion, subject to the tax.

Caption "B" may involve interstate revenue. If this is a fact, proper apportionment between interstate and intrastate should be determined, as outlined in the previous interstate portion of our opinion. The latter, intrastate portion, would be subject to the tax.

Your letter requests an opinion on four additional items, namely: commissions, directory advertising, and rental and other operating revenues.

Telegraph Commissions

The total of three items amounts to approximately \$197,000 for the three year period. No detail has been furnished under the current Report. The Grossman opinion discusses this item in which he states he does not agree that this revenue is exempt from the tax. We quote further from the opinion:

"It is either the company's revenue from the business of transmitting telephone messages or a non-deductible expense of the Western Union's business of transmitting telegraph messages. The pertinent questions which must be resolved are whether the amount involved is derived from the transmission of messages originating in the city and whether all or any part of said amount is for interstate service charges."

We concur in the Grossman opinion, and suggest that the pertinent question referred to therein be the basis for further investigation so that the proper facts pertaining to this item may be ascertained.

Directory Advertising

This item was likewise the subject of discussion in the Grossman opinion, in which he stated:

"This revenue in my opinion is for furnishing service or facilities of the company in connection with the transmission of messages and subject to the gross receipts tax as captioned in Extra Listings heretofore discussed."

Our investigation of the current law and facts furnishes no basis for deviating from the Grossman opinion.

Rent Revenues

This item was discussed in the memorandum furnished us by your office entitled "Excerpts from audit report of Wolf and Company covering their

examination of the City of Chicago Utility Tax Returns filed by Illinois Bell Company for the twelve months ended December 31, 1956". These excerpts state that the rental revenues represent rental to others of surplus telephone plant constituting a part of the property used by the company in its telephone operations, such as, space in buildings, space in conduits, etc., not presently needed by the company in its operations.

We are not informed as to whether or not the space referred to is directly or indirectly involved in the transmission of messages originating in Chicago. This fact should be determined before we can express any opinion as to whether or not the item is subject to the tax.

Other Operating Revenues

In the excerpts referred to, in the paragraph immediately above, this item is described as constituting other operating revenues and other items of income not accounted for elsewhere in the classification of the Company's accounts. We are not furnished with sufficient facts to determine whether or not this item properly comes within the terms of the municipal utility tax. *Illinois—Department of Finance—Precedent*

In its letter, the Company further contends that, "since the Illinois Bell Telephone Company's tax returns under the Chicago Utility Tax have been prepared in a manner entirely consistent with its tax returns regularly filed with and accepted by the State of Illinois under the Messages Tax Act, it follows that no additional tax is due to the City under the parallel enabling legislation and ordinance". The Company submits no authorities to support this conclusion and we are, therefore, compelled to assume that no such authorities exist. We do not agree with this conclusion and, in our opinion, the City has the clear right to insist upon its interpretation of the provisions of the ordinance regardless of any position previously or currently assumed by the State of Illinois (*People by Barrett, Auditor v. Bradford, et al.*, 372 Ill. 63 (1939)).

We shall continue our study of the Wolf and Company Report on tax returns of the Commonwealth Edison Company, The Peoples Gas Light and Coke Company and the Western Union Telegraph Company, and will discuss the Report on each of the said Companies by separate letters.

UTILITY TAX

(*First Deputy Comptroller—J. J. D.—March 6, 1964*)

You have requested a legal opinion as to whether or not the deductions from gross revenue, in arriving at the utility tax for the three years ending December 31, 1962 as shown on audit by Wolf and Company for the same period, are subject to the tax.

The items referred to were shown by the Report, in the order listed, as follows:

(1) *Less Servicing of Customers' Installations*

<u>1960</u>	<u>1961</u>	<u>1962</u>
\$121,983.42	\$118,172.75	\$126,585.37

This deduction was held to be not exempt under an opinion rendered by Special Assistant Corporation Counsel Joseph F. Grossman that was dated July 1, 1957. In his opinion, Mr. Grossman stated:

"The deduction of \$221,039.54 should be disallowed for the reason that the revenue from this source is included in the definition of gross

receipts as a service rendered in connection with the distribution and sale of electricity. The tax is not limited by the law or ordinance to gross receipts from supplying electricity. It is imposed upon persons engaged in that business and is applicable to all services rendered in connection with the supply of electricity. The Company chooses to repair customer owned equipment for compensation to condition the equipment for consumption of electric energy and is properly one of the incidental functions of the business of supplying electricity."

We have no basis in either law or facts for arriving at a conclusion contrary to the one expressed in the Grossman opinion. We, therefore, believe this item is subject to the municipal utility tax.

(2) *Gross Revenue from electricity supplied for resale*

<u>1960</u>	<u>1961</u>	<u>1962</u>
\$9,246,534.99	\$9,007,098.65	\$8,713,555.68

This revenue was specifically exempt from the municipal utility tax, under Section 132-17 of the Municipal Code of Chicago.

(3) *Light bulb rentals subject to municipal retailers occupational tax (Note)*

<u>1960</u>	<u>1961</u>	<u>1962</u>
—	\$762,989.64	\$1,346,360.73

It is noted in the Report that from September 1, 1961 up to September 30, 1962, as a result of an amendment to the Illinois Retailers Occupational Tax, the Company paid that tax on receipts from light bulb rental and excluded such receipts from the computation of the municipal utility tax. After September 30, 1962, when the amendment was declared unconstitutional, the Company included such rentals in receipts subject to the utility tax. In view of this explanation, we believe the item under this heading to be exempt from the utility tax.

(4) *Uncollectible accounts*

<u>1960</u>	<u>1961</u>	<u>1962</u>
\$646,212.64	\$577,583.29	\$569,901.35

Section 132-16 of the Code defines "gross receipts" as the "consideration received for . . . selling electricity". It is our opinion, that this item is properly excluded from the municipal utility tax base.

(5) *Credit on amount of tax-accrued compensation to City of Chicago under franchise ordinance (4% of gross operating revenue less uncollectible accounts)*

<u>1960</u>	<u>1961</u>	<u>1962</u>
\$9,591,275.13	\$9,894,657.12	\$10,199,732.90

This item is exempt from the municipal utility tax, under Section 132-21 of the Municipal Code.

MUNICIPAL EXEMPTION

(Commissioner of Aviation—R. L. H.—May 4, 1964)

We are duly in receipt of your letter of April 29, 1964, wherein you request our opinion as to whether the City may enter into farm leases at the airport without jeopardizing our tax exemption status.

Your attention is directed to a 1955 case in the Illinois Supreme Court entitled *The City of Lawrenceville v. Maxwell*, 6 Ill. 2d 42, wherein at Page 49, the Court stated:

"Where property owned by a municipality is used for two purposes one of which is exempt from taxation and the other not, that part which is devoted to a use not exempt is subject to taxation, and where municipal property . . . is devoted in part to farming and in part to an airport, that part used for farming and not devoted to exclusively municipal or public purposes is taxable."

In light of the foregoing, it is our opinion that the City cannot enter into farm leases at the airport without jeopardizing our exempt status.

If we can be of further service to you in this matter, please feel free to call upon us at your convenience.

FOREIGN FIRE INSURANCE TAX

(Director of Insurance, State of Illinois—M. M. M.—February 1, 1965)

In reply to your letter of January 21, 1965 the following is a sample calculation of the method our office used to allocate the percentage fire premium for tax purposes on policies where the fire premium is combined with premiums for other coverages.

Assume a \$15,000.00 Homeowners Policy on a brick dwelling with an approximate annual premium of \$40.00. The total building and content fire insurance coverage under a \$15,000.00 Homeowners Policy is approximately \$21,000.00 which, if purchased separately at existing dwelling rates, would cost about \$17.20 per year. If we assume that no discount was made in fire rates when they were put into the Homeowners Policy, the fire rates would appear to be 43% of the total premium of the Homeowners Policy.

A similar calculation of the Homeowners Policy on a frame dwelling indicates the percentage of the dwelling fire premium to the total Homeowners premium to be approximately 63%.

Averaging the two percentages you get 53% which we rounded off to 55%.

Our Office has not made a final determination as to whether when the statute is silent it is allowable to allocate a percentage for fire premiums where the fire premium is not separately set forth on the policy.

I would suggest that your Office request the Illinois Inspection and Rating Bureau to furnish you with *any and all studies* made by them on their members or subscribers on the proper allocation of fire premiums where the fire premium is combined with the premium for other coverage.

INTEREST FROM FUNDS PAID UNDER PROTEST

(City Comptroller—R. L. C.—January 26, 1966)

Your letter of January 19, 1966 states:

"As of December 31, 1965, the Treasurer of Cook County was holding in reserve \$17,167,000 applicable to the City of Chicago's share of railroad, capital stock and general real estate and personal property taxes."

and you solicit an opinion as to whether or not the City is entitled to interest earned by the investment of these sums while in the hands of the County Treasurer.

H. B. 1474 passed by the 74th General Assembly and approved by the Governor on August 9, 1965 (Chapter 120, Section 673a, Illinois Revised Statutes) authorizes the County Treasurer to invest "up to 75% of the proceeds of any taxes paid under protest"; and provides further that "all earnings accrued on any such investment or bank savings account shall be credited to and paid into the county corporate fund."

Nowhere in the act authorizing the investment of taxes paid under protest is there language which supports the distinction which you suggest "between unallocated funds and funds that have been set aside and allocated to other government units."

Protest funds in the hands of the County Treasurer ultimately find their way to a maze of private interests, as well as numerous municipal corporations. In order to secure the benefit of the interest on these funds to the public and to reduce the administrative burden to a minimum, the language, "shall be credited to and paid into a county corporate fund," was specifically adopted; thereby inferentially precluding the distribution which you suggest.

In construing statutory language, "the legislative intent is to be construed not only from the language used, but also from the reasons for the enactment and the purposes to be thereby attained" (*In re Curtis Estate*, 28 Ill. 2d 172). The "reason and purpose" for H. B. 1474 was to give the County Treasurer the authority to put these previously unproductive funds to use for the benefit of the public; this language effectively achieves that purpose. To attempt to broaden the language would do violence to the obvious intent:

"It is the function of the court to construe statutes in accordance with the normal import of the words used, whatever its opinion may be regarding the desirability of the results produced by their operation. If hardships do occur a manner of relief rests with the legislature." (*City of Champaign v. Champaign Township*, 16 Ill. 2d 46.)

Section B. MANAGEMENT OF CITY FUNDS

DISTRIBUTION OF FUNDS FROM SALE OF IMPOUNDED VEHICLE

(City Comptroller—J. G. O.—July 14, 1961)

We are in receipt of your letter of July 5, 1961, in which you ask our advice as to what disposition you should make of the funds derived from the sale of impounded automobiles.

The Legislature enacted a Bill in the 72nd General Assembly which reads, in part, as follows:

"Whenever the Municipal officer as defined in Section 35b-2(2) hereof, in a Municipality of more than 500,000 population, has determined that the motor vehicle is abandoned as herein provided and has appraised it at a value not exceeding \$100, and has made a record thereof in his department, the provision as to offering said vehicle at any public auction shall not apply but said officer shall notify in writing the Purchasing Agent of such Municipality to dispose of and said Purchasing Agent shall dispose of said motor vehicle in accordance with the provisions of Section 22a-3 of the 'Municipal Purchasing Act for Cities in excess of 500,000 population.'"

Section 47 of Chapter 95½, Ill. Rev. Stats. 1959 of the Motor Vehicles Act which applies to the sale of abandoned vehicles, reads as follows:

"The proceeds of any such sale after paying all liens and deducting all reasonable charges and expenses incurred by any such municipal officer or sheriff charged with keeping of abandoned, lost, stolen or unclaimed property in receiving, keeping, advertising for sale, or selling or otherwise disposing of any such motor vehicle, shall be paid into the treasury of the municipality or county as the case may be."

In view of Section 47, it is our opinion that the proceeds of the sale of abandoned automobiles shall be credited to the corporate purposes fund after deducting all expenses reasonably related to the collection and disposition of abandoned automobiles.

SUBCONTRACTORS' MECHANIC'S LIENS

(J. P. B.—F. O.—March 13, 1962)

Relative to your recent request directed to this office in connection with the above, be advised that it is our opinion that no legal description of the job site is necessary other than as hereafter indicated.

Your attention is invited to the provisions of Section 23, of the Mechanics Lien Act, Chapter 82, Ill. Rev. Stat. 1961, indicating that liens of subcontractors employed upon public improvements creates the lien upon the public funds rather than the public lands.

Under the circumstances, a description of the particular buildings or site upon which the subcontractor has been employed, and that same is situated upon the Chicago-O'Hare International Airport located in the City of Chicago, County of Cook, State of Illinois, would in our opinion suffice for your lien purposes.

ENFORCEMENT OF SUBCONTRACTORS' LIEN

(Purchasing Agent—F. O.—April 9, 1962)

In response to your request for our opinion relative to the complaint of Acme Temperature Control that the M. Gerlach Jr. Company has improperly imposed a subcontractors lien upon funds due the former, he advised as follows:

Our records reveal no legal proceeding to have been instituted to enforce the cited claim. Consequently since 60 days have elapsed since the serving of notice of lien upon the City, and since to our knowledge no suit has been filed by M. Gerlach Jr. Company to enforce its lien claim (for \$252.00), *within said period* as required by the provisions of Section 23, Chapter 82, Ill. Rev. Stat., said monies may be paid to Acme Temperature Control.

NOTICE OF SPECIAL ASSESSMENTS

(City Collector—J. E. C.—July 23, 1962)

In your letter of June 21, 1962, you request our opinion as to a change in the billing of special assessments.

As you state, the statute pertaining to the collector's notice and the collector's demand fails to require in either a published notice, or a written notice, or printed notice that the legal description be disclosed.

In our opinion, the use of the docket number, special assessment warrant number, permanent real estate index number, the name and address of assessee and the type of improvement would be sufficient identification to the assessee in the billing of special assessments. The property owner is also notified of the special assessment due by the marking on his tax bill, which is issued by the County Collector, as required by the statute.

We find no objection to the IBM system as indicated in your letter of June 21st, for the billing to the assessee of the special assessment levied and certified by the courts.

USE OF PARKING FACILITY REVENUE

(P. S. & C.—J. D. M.—March 8, 1963)

In connection with your examination of the financial statements of the Chicago Parking Facilities as of December 31, 1962, please be advised as follows:

1. The City of Chicago has satisfactory title to all assets acquired by expenditures from the Parking Facilities funds. No mortgages, pledges or other liens are outstanding against such assets, except that revenues and fund balances are pledged to be applied in accordance with the provisions of the Authorizing Ordinance.
2. No suits are pending against the City of Chicago arising out of alleged damage to the value of property at or near parking sites.

3. There are approximately \$3,000.00 of payable and unpaid taxes as of December 31, 1962.
4. The charges made from the Corporation Counsel's Office to the Parking Facilities funds during the year ended December 31, 1962, represent services rendered in connection with all legal matters pertaining to Parking Facilities fund (including the legality of all contracts, questions of title, etc.). The charges to the Parking Facilities Funds from the Corporation Counsel's Office represent a fair allocation of costs incurred by the Land Acquisition Division and other divisions of the Law Department.

In our opinion, the terms of the Parking Facilities Ordinances (adopted September 18, 1952), and as subsequently amended, permit the allocation of costs of the Corporation Counsel's Office on the basis outlined above and of costs allocated from other City departments, within the amounts appropriated therefor by the City Council, and that Parking Facility funds has no liability to the City or anyone else for costs incurred by any City departments other than for such amounts as are charged to it on the foregoing basis. It is also our opinion that the absorption by other City departments of costs of policing the lots or any other costs associated with operation of the Parking Lots does not preclude the City from charging similar costs to the lots in the future.

USE OF RESERVE MAINTENANCE ACCOUNT

(City Comptroller—J. E. S.—April 8, 1963)

In your letter of January 30, 1963, you inquire whether the \$685,535.00, or more, in the Reserve Maintenance Account can be used for construction work on the new International Terminal Building at O'Hare Airport.

Article V—Sections 5.01, 5.02 and 5.03 of the Bond Ordinance above referred to make it abundantly clear that:

1. Operating revenues from flight fees, rentals, concessions and other sources of income are accounted for collectively through the revenue fund and are restricted as to use for the purposes enumerated and for each specified purpose stated for the separate accounts provided within the revenue fund.

2. The City as a Trustee for the benefit of the bondholders is chargeable with a trustee's obligations and duties with respect to such fund.

3. The Reserve Maintenance Account, as one of the allocated accounts of the revenue fund, may be used only for one of the following authorized purposes:

- (a) To make payments to the interest account, the debt service reserve account, and the sinking fund account, whenever a deficiency exists, for the purpose of paying interest; or whenever a deficiency occurs for the purpose of a payment to the sinking fund.

- (b) To pay operation and maintenance expenses when there is an insufficiency of other funds.

- (c) Whenever proceeds of insurance are insufficient to replace damaged or destroyed City owned property at the airport, funds may be withdrawn from this account.

- (d) To pay for major repairs, renewals and replacements of terminal buildings, landing areas, aprons, related facilities, equipment or otherwise, provided such major repairs, renewals and replacements

are caused by normal wear and tear or unusual and extraordinary occurrences and provided further that the consulting engineer approves the making of such repairs, renewals or replacements as evidenced by his certificate.

Disbursements from the Reserve Maintenance Account for the purpose of paying the cost of major repairs, renewals and replacements, are made in the same manner and subject to the same conditions as provided in Section 301 of the ordinance with respect to disbursements from the general construction accounts.

We are informed that the present amount intended to be used for the construction is \$865,000.00; that the contemplated construction has been determined by the City to, in fact, consist of major repairs, renewals and replacements caused by normal wear and tear and that such repairs, renewals or replacements are made within the requirements of the ordinance as evidenced by the certificate of the Consulting Engineer, and further has the full approval as being a proper use of the Reserve Maintenance Fund, by the Airlines and the Aviation Department. It would be our opinion therefore, that the proposed expenditure is legal and proper.

You also request an opinion on whether the amount so withdrawn from this Fund must be replaced out of earnings. You quote the following language from Article V, Section 5.03 Fourth of the ordinance:

"Any moneys in the Reserve Maintenance Account which shall be used or transferred as aforesaid, shall be restored by the City from the first available moneys in the Revenue Fund, subject to the same conditions as are hereinabove provided for deposits to the credit of this Account."

In reference to deposits, said paragraph also provides that on and after December 31, 1961, the sum of \$600,000 (now \$745,000) shall be deposited in the Reserve Maintenance Account until there shall have been accumulated in said Account, the sum of \$2,500,000 (now \$3,104,166.66), provided that if less than the amount required to be deposited in any fiscal year, shall be so deposited the requirement therefor shall be cumulative.

It is our opinion that cumulative deposits referred to are only intended to apply when and in such event that the stipulated annual deposit of \$600,000 (now \$745,000) is not made in whole in any one year.

It is our further opinion that barring an additional payment to eliminate a past deficiency in annual payments, the maximum annual payment required to be made into said fund is as outlined in said ordinance, the aforesaid sum of \$600,000 (now \$745,000).

The language quoted in your letter concerning restorations to the said fund is, as stated therein, subject to the same conditions as are hereinabove provided for deposits to the credit of the Account. So, consequently, it would again be our opinion that the annual payment, whether viewed as restoration or as deposit, would not in any event be required to exceed the sum of \$600,000 (now \$745,000) annually, provided only that payments necessary to compensate deficiencies in prior year deposits to the fund are not now required.

EXEMPTION FROM WATER SERVICE CHARGES

(Commissioner of Water and Sewers—J. S. T.—May 29, 1963)

The University of Chicago has at the present time various dormitories for the use of members of their student body. The University of Chicago contemplates to construct, erect and maintain additional dormitories for the use of their students. The question presented is the exemption of these dormitories from the payment of taxes and water service charges. In an opinion written on February 8, 1954, No. 11784 by Maynard I. Wishner, Assistant Corporation Counsel of the City of Chicago a rather detailed and exhaustive study was conducted by Counsel and in it he cited *City of Chicago v. University of Chicago*, 228 Ill. 605 (1907) in which the court said:

"For hundreds of years the dormitories of the universities and colleges have been an essential part of the universities and colleges. When the American colonies began founding universities and colleges the first step was the erection of buildings for lodging and feeding students while they pursued their studies under the supervision of the college authorities and the courts have uniformly held that buildings used by colleges exclusively as dormitories and dining halls for its students or premises occupied by the President or Professors and their families are devoted to the purpose for which such institutions are organized."

The Supreme Court of Illinois in construing the water exemption ordinance of the City of Chicago reading substantially the same as the one now before us, held that sleeping quarters and dining halls housing and feeding students at the University of Chicago were used "*in the immediate conduct and carrying on the charitable purposes of the University. And the fact that a charge was made for room rent and meals did not mean that the buildings were used for the purposes of producing revenue.*"

It has been further held by the Supreme Court of the State of Illinois in *People v. Youngmen's Christian Association of Chicago*, 365 Ill. 118 (1936) that the operation of a hotel by the YMCA was in furtherance of the charitable purpose of the association and the property was held exempt from taxation by the terms of its charter. The court held that under these circumstances furnishing wholesome living conditions to young men at a price they can afford to pay and thereby correcting "the social evils that surround men who would be otherwise compelled to live in cheap housing among sordid environments" was a charitable purpose. Thus we have illustrated above the two situations where, despite the fact that sleeping accommodations were furnished, it was held that the property was entitled to be exempt from taxation.

It is our opinion that the opinion written by Mr. Wishner No. 11784 February 8, 1954 is the law as of this date and that under Section 185-47 entitled Exemption of the City Code of Chicago all dormitories of the University of Chicago are exempt from the payment of water service charges.

City of Chicago v. University of Chicago, 228 Ill. 605; *People v. YMCA of Chicago*, 365 Ill. 118; *People v. Catholic Bishop of Chicago*, 311 Ill. 11.

Opinions of Corporation Counsel and Assistants, Vol. 24 Page 626, Water Tax Exemptions for Religious Institution.

UNCOLLECTIBILITY OF SUSPENSE ACCOUNTS

(Commissioner of Water and Sewers—W. M. Z.—June 6, 1963)

Please refer to your communication with reference to the above subject matter.

Section 8-1-11 of the Municipal Code provides that:

"The commissioner of water and sewers shall cause to be opened in the General ledger of the bureau of water two accounts, to be known as the suspense accounts number 1 and number 2. In suspense account number 1 shall be shown the totals of all of the accounts and items which may be ordered transferred under any section relating to frontage rates accounts; and in suspense account number 2 shall be shown the totals of all the items which may be ordered transferred under any section relating to meter rates accounts.

"The commissioner of water and sewers shall provide suitable detailed ledgers, in which the detailed accounts of suspense accounts number 1 and number 2 shall be kept and shown. All accounts affected by order of court and recommendations of the corporation counsel shall come within the scope of this section (Passed. Coun. J. 11-10-52, p. 3412)."

An examination of the records kept by your department and the records of your accounts forwarded to our department for collection, indicate that every effort has been made to collect the water suspense accounts from the year 1953 through the year 1954.

It is our opinion that these accounts are uncollectable and under modern accounting methods should no longer be carried on your records as a valuable asset. You, no doubt, are aware that the statute of limitation on open accounts is five (5) years.

It is our opinion that the items in suspense account from the year 1953 to the year 1954 are uncollectable and should be stricken from your records.

PAYMENT TO BANKRUPT CREDITOR

(City Architect—F. O.—June 11, 1963)

Returned herewith is your communication to this office, together with attachment thereto, relative to your request for our advice in connection with the above cited contract.

You have indicated in your letter that the Continental Plumbing Company, Inc., heretofore employed by the City of Chicago to perform the plumbing work on the 39th Ward Yard building, had completed said contract but apparently went into bankruptcy without having requested final payment of \$127.34 due thereunder. This work, you state, has been satisfactorily completed and the City has been in occupancy since 1960.

You now desire information relative to how the final payment can be made to the trustee, and whether the affidavit and final waivers required to be submitted by the contractor under said contract may be waived.

It is our opinion that the final payment of \$127.34 can be made to the trustee (Craig Phelps, Trustee in Bankruptcy of Continental Plumbing Company, Inc.), without the necessity of submitting the affidavit and final waivers. This, however, is subject to (1) determination by the City Comptroller, prior to payment, that no lien claims under Section 23, Chapter 82, Illinois Revised Statutes, have been filed against this fund, and (2) proper identification of the trustee (A certified copy of the court order should be adequate for this latter purpose).

It is our opinion that compliance with the foregoing will adequately protect the City. Should our services be further required in connection with this matter, please do not hesitate to so advise.

SPECIAL FUNDS

(City Comptroller—J. C. M.—June 12, 1963)

In your letter of June 10, 1963, you advise that you have been requested by the Purchasing Department to set up a procedure whereby the Purchasing Agent would send to the City Comptroller the checks received as bid deposits from the three lowest bidders on each contract. It is proposed that these checks would be deposited through the City Treasurer and that the bidders' accounts be credited on a Special Deposit Ledger.

You inquire as to whether or not such procedure is legal.

It is our opinion that such procedure is legal and advisable provided that the characterization of the deposits is always "Special Funds."

We had one experience where we had a \$30,000 certified check on a bank at Nashville, Tennessee that we were unable to collect upon after the bidder had reneged on executing the contract. By depositing these funds and having the checks cleared, we get additional security in the event the lowest bidder refuses to proceed to execute the contract.

JOINING NOISE ABATEMENT COUNCIL

(Commissioner of Aviation—R. L. H.—July 8, 1963)

Your letter of May 28, 1963, requested our opinion as to the legal aspects, as far as the City of Chicago was concerned, in the above cited proposal. We are now also in receipt of your letter of July 3, 1963, wherein we are advised that the membership of the Airport Operators Council has voted to join NANAC, and that a membership application will be processed.

The expenditure of public funds for dues payments to organizations has been questioned in the courts of many jurisdictions. The Illinois Supreme Court, in the case of *People v. Bunge Bros. Coal Co.*, 392 Ill. 153, 166, has upheld as expenditures for public purposes dues payments in both the Illinois Municipal League and the United States Conference of Mayors on the basis that both of these organizations were associations of municipal officials.

Since it is our understanding that the AOC is composed not only of municipal airport operators, but also of private airport operators, there is some question as to the propriety of the expenditure of public funds as dues in this not wholly municipal official association. However, since your request does not relate to this specific point, further discussion will not be here made.

You submitted to us with your letter of May 28, 1963, a list of the Objectives and Purposes of NANAC. From our examination of the eight points listed, we find some which are unobjectionable and others which definitely appear to assume non-delegable functions of government, especially when said assumed delegation is in an organization twice removed from the governmental body.

Acquisition and dissemination of information is one function to which there can be no objection. As soon as an organization goes beyond this point and attempts to influence legislation, provide counsel, and formulate and effectuate national noise abatement policy, this organization is treading in the realm of policy decisions which are exclusively governmental functions as far as the City of Chicago is concerned.

For example, we do not believe it proper for NANAC to choose a noise abatement program contrary to the best interests of the City, and have the City paying for the promotion of this program through the use of that part of our dues payment to the AOC which is in turn paid to NANAC as part of AOC's dues therein. In this example, which is not beyond the realm of immediate possibility due to the voting membership of NANAC's Board of Directors, the City may find itself financially contributing to both sides of an issue.

It is therefore our opinion that membership in NANAC is not in the best interests of the City and may possibly be beyond the City's delegative authority. We suggest that attempts be made to revise the dues payment structure in AOC to reflect a non-payment by the City of that portion of the dues which reflects the expense for activities of both the AOC and NANAC which are contrary to the interests of the City, beyond the delegative authority, and beyond the realm of gathering and dissemination of information.

In the event such a dues revision can not be accomplished, it would be our suggestion that thought be given to our resigning from the AOC.

We will be pleased to discuss this matter further with you if you desire at your convenience.

PAYOUTS WITH LIENS PENDING

(City Comptroller—W. R. M.—July 18, 1963)

We refer to your letter of July 8, 1963, wherein you state the question as to whether or not your office may accept and make payouts of moneys due on aforesaid contract on a letter from the Reliance Standard Insurance Group, surety on said contract, in lieu of waivers from certain sub-contractors and material men wherein the said contract specifically provides for waivers.

Your letter also states that there is a lawsuit pending against the Hollinger Concrete Construction Company—by the Material Service, Division of General Dynamics Corporation—Case No. 62 C 6695 for money due and owing under this contract.

Chapter 82 Section 23 (Illinois Revised Statutes 1961) sets out clearly the procedure to be followed by sub-contractors to establish liens on funds due under contracts where money is still in the hands of a municipality and to obtain payment thereof and the procedure outlined in your letter is not one of them.

Please be advised that no funds may be released by the City until said liens are determined by a Court according to procedure contained in the aforesaid statute.

LEGAL TRANSFER OF TRUST FUND

(First Deputy Comptroller—E. W. P.—August 20, 1963)

We have your letter of August 15, 1963, advising that you carry on the City records trust funds No. 606 J. Lloyd Armstrong Principal Fund \$10,000.00 and No. 604 J. Lloyd Armstrong Income Fund, \$5,988.43, bequested by Ada J. Biggs, deceased. You state further that the Clerk of the Municipal Court holds \$970.00 on deposit with the court, withdrawn from the Interest Fund No. 604 but not used for the benefit of orphan and homeless girls.

You also attach a letter from Hon. Augustine J. Bowes, Chief Justice of the Municipal Court of Chicago, recommending that the funds be transferred to the treasury of the City and that this cash, together with the funds held in trust by the City Comptroller, be transferred to the Corporate Fund. The reason given for the transfer to the Corporate Fund is that expenditures of trust fund income are to be made by the Municipal Court of Chicago and as of January 1, 1964 there will no longer be a Municipal Court, the same being absorbed by the Circuit Court of Cook County.

You request our opinion as to whether the City Comptroller may legally transfer the trust fund principal and interest to the Corporate Fund in view of the changing status of the court on January 1, 1964. It is our opinion that this transfer cannot be made at this time. However, we concur in your opinion that you can accept the return of the \$970.00 from the Clerk of the Municipal Court immediately, depositing it in the J. Lloyd Armstrong Income Fund No. 604. The balance of the fund will then be intact and further action with reference thereto should proceed through the City Council of the City of Chicago.

USE OF WATER FUND

(City Comptroller—J. C. M.—January 21, 1964)

In your letter of January 17, 1964, you pose two questions to be answered by this department in connection with a questionnaire submitted to your department by the State of New York Banking Department as follows:

Item 6 of questionnaire:

Is the issuer obligated by statute, charter, indenture or covenant to fix, maintain, and collect charges or taxes, or both, to provide net revenues after operation and maintenance of the facilities used to provide such service sufficient to meet maturing interest, principal, and sinking fund payments on the above-listed obligations; or empowered to require the fixing, maintaining, and collecting of such charges or taxes, or both, by duly authorized public officers or bodies? Yes.... No....

It is provided in the Water Certificates that are issued "and rates charged for water must be sufficient to make such payments and shall not be reduced while any of such Certificates are unpaid."

Item 7 of questionnaire:

Is the issuer restrained by statute, charter, indenture or covenant from disposing of all or a substantial portion of such facilities unless provision is made either for a continuance of the interest, principal, and sinking fund payments due on the above-listed obligations or for retirement of such obligations? Yes.... No....

On December 16, 1926, an opinion in Volume XV of the opinions of the Corporation Counsel (P. 507) was rendered relating to a transfer of a parcel of land purchased out of the proceeds of the water fund. The land in question was asked for by the Superintendent of Police for purposes of a police station.

The Corporation Counsel held in that opinion that if the property in question is not required for water purposes that appraisalment of the property be made by some disinterested qualified person and a report made to the City Council and that the City Council pass an order directing that the property may be used for a police station upon the transfer of the amount of money fixed as the proper price of the property, from the general corporate fund to the water fund.

It is the opinion of the Corporation Counsel that all of the water receipts and property assets purchased by the use of the water fund are trust funds and trust property. Any of such property no further needed by the Water Department, and disposed of by sale, it follows that the proceeds therefor must be paid into the special water fund.

Chapter 24, Section 11-133-3 provides:

"Whenever certificates of indebtedness are issued pursuant to this Division 133, the entire revenue received from the operation of the waterworks system shall be deposited in a separate fund, designated as the water fund of the municipality of This fund shall be used only in paying (1) the cost of maintenance and operation of the waterworks system, (2) obligations of the municipality theretofore issued that are payable by their terms from this revenue, whether in the form of certificates, bonds, or otherwise, and (3) certificates issued pursuant to this Division 133.

Rates charged for water shall be sufficient to pay the cost of maintenance and operation and to pay the principal of and interest upon all of the specified certificates and bonds. These rates shall not be reduced while any of these certificates or bonds are unpaid."

While there is no specific statutory provision providing for the disposition of all or a substantial portion of the waterworks facilities the law of contracts would apply in connection with the water certificates and it is the intent of the legislature as appears from the foregoing quotation that the water fund and the properties purchased by the Water Department are held in trust and could not be disposed of to the detriment of the holders of water certificates.

FUNDS GOVERNED BY THE PARKING FACILITIES ORDINANCES

(P. S. & C.—J. D. M.—March 13, 1964)

In connection with your examination of the financial statements of the Chicago Parking Facilities as of December 31, 1963, please be advised as follows:

1. The City of Chicago has satisfactory title to all assets acquired by expenditures from the Parking Facilities funds. No mortgages, pledges or other liens are outstanding against such assets, except that revenues and fund balances are pledged to be applied in accordance with the provisions of the Authorizing Ordinance.
2. The City Council, on September 27, 1963, Council Journal pp. 1022-23, authorized the sale of Parking Facility Number 53 located at 743-771 West DeKoven Street and 744-768 West Grenshaw Street. The said

sale was to the Department of Urban Renewal for \$180,000.00 and said money was deposited in Parking Facility Construction Fund, Account Number 720. If you desire a certified copy of said ordinance, it can be furnished by this office.

3. No suits are pending against the City of Chicago arising out of alleged damage to the value of property at or near parking sites.
4. There are approximately \$3,000.00 of payable and unpaid taxes as of December 31, 1963.
5. The charges made from the Corporation Counsel's Office to the Parking Facilities funds during the year ended December 31, 1963, represent services rendered in connection with all legal matters pertaining to Parking Facilities fund (including the legality of all contracts, questions of title, etc.). The charges to the Parking Facilities funds from the Corporation Counsel's Office represent a fair allocation of costs incurred by the Land Acquisition Division and other divisions of the Law Department.

In our opinion, the terms of the Parking Facilities Ordinances (adopted September 18, 1952), and as subsequently amended, permit the allocation of costs of the Corporation Counsel's Office on the basis outlined above and of costs allocated from other City departments, within the amounts appropriated therefor by the City Council, and that Parking Facility funds has no liability to the City or anyone else for costs incurred by any City departments other than for such amounts as are charged to it on the foregoing basis. It is also our opinion that the absorption by other City departments of costs of policing the lots or any other costs associated with operation of the Parking Lots does not preclude the City from charging similar costs to the lots in the future.

DISTRIBUTION OF FUNDS

(O. H. L.—J. C. M.—May 25, 1964)

In your letter of May 22, 1964 you inform us that the Police Department is collecting money as fees for the service of *Subpoena duces tecum* and that said Department is distributing these fees periodically to the Police Benevolent Association. You inquire as to the legality of this procedure.

Section 7-8 of the Municipal Code of Chicago provides in part:

"License fees, fees for inspections, fees for permits, compensation for franchises, and all other payments of money to the City not otherwise specifically provided for, shall be paid directly to the City Collector and such payments shall be transmitted daily by the City Collector to the City Treasurer."

Under Chapter 24, Section 1-2-8 it is provided:

"* * * and all other money collected for the municipality shall be paid into the treasury of the municipality, at such times and in such manner as may be prescribed by ordinance."

Under the Code provisions all fees so received under either section must be paid directly to the City Collector, who in turn must transmit them to the City Treasurer. No department head has any authority to disregard the provisions of the Code.

Therefore, it is our opinion that it is contrary to the Code provisions for the Police Department to remit money received for the service of *Subpoena duces tecum* to the Police Benevolent Association.

RESERVE MAINTENANCE ACCOUNT FOR O'HARE

(Commissioner of Public Works—S. R. D.—January 18, 1965)

We acknowledge receipt of your letter of January 7, 1965, supplemented by your letter of January 11, 1965, wherein you request our opinion as to whether it would be possible to enter into a contract directly with Lockheed Air Terminals, Inc., to perform the work of replacing the tank farm underground electrical cables at an estimated cost of approximately \$30,000, or whether it is necessary to comply with the provisions of the Municipal Purchasing Act.

Section 5.03 of the Chicago-O'Hare International Airport Ordinance (C. J., 12-29-58, p. 9379) provides for the establishment of various accounts, including the Reserve Maintenance Account and for the deposit of certain funds in said account to be "held in reserve for the purpose of paying the costs of major repairs, renewals and replacements * * * at the Airport" (p. 9381). Section 5.03(2) Fourth (C. J., 12-20-58, p. 9381) provides for the method of payment from the Reserve Maintenance Account of the cost of major repairs at the Airport provided the same is approved by the consulting engineer. However, we find no provision in the Ordinance for the letting of a contract in the method suggested in your communications. We are, therefore, of the opinion that the proposed contract is subject to the Municipal Purchasing Act (Ill. Rev. Stats. 1963, ch. 25, pars. 8-10-1 to 8-10-23).

Section 8-10-3 of the Municipal Purchasing Act provides that "all purchase orders or contracts of whatever nature, for labor, service or work, * * * materials, equipment, or supplies involving in excess of \$2,500 * * * shall be let by free and open competitive bidding after advertisement * * *." In our opinion the contemplated work falls within the provisions of Section 8-10-3 and not within the exemptions set forth in Section 8-10-4 of the Act. However, if the proposed work is an emergency, the provisions of the Act pertaining to competitive bidding might be circumvented by an ordinance passed by the City Council as provided in Section 8-10-5 of the Act.

Summarizing the foregoing, we are of the opinion that the proposed contract described in your letter of January 7, 1965, as supplemented by your letter of January 11, 1965, is subject to the competitive bidding provisions of the Municipal Purchasing Act, unless an emergency ordinance is passed by the City Council as provided in Section 8-10-5 of the Act.

FUNDS FOR MAINTENANCE OF STREETS

(Commissioner of Streets and Sanitation—A. H. & S. R. D.—October 4, 1965)

Your letter of September 28, 1965, requests our opinion as to whether certain items of expenditure, which will be discussed in detail later in the opinion, may be charged to the Vehicle Tax Fund or to the Motor Fuel Tax Fund.

Before specifically discussing the various items listed in your letter, it might be well to first discuss the provisions of the Vehicle Tax Act and the Motor Fuel Tax Act.

Section 8-11-4 of the Illinois Municipal Code of 1961 (Ill. Rev. Stat. 1963, Ch. 24, par. 8-11-4) provides that the funds derived from the Vehicle

Tax may be used for the construction, maintenance and operation of testing stations and that "the balance of such funds in cities, villages and incorporated towns of 40,000 or more inhabitants . . . shall be used for the purpose of improving, paving, repairing or maintaining the streets and other public roadways within such city, incorporated town or village, provided, that the actual cost of the collection of such fees and the disbursement thereof may be deducted from the total amount collected . . ."

The foregoing provision was the subject matter of an opinion written by First Assistant Corporation Counsel Joseph F. Grossman in 1947 (Opinions of the Corporation Counsel, Volume XXII, p. 528). In discussing the uses to which Vehicle Tax Funds might be put, he said (p. 529) :

" . . . [I]t is our opinion that 'maintaining streets' is not limited to paving and repairing them. Thus, the vehicle tax fund may be used not only for improving, paving and repairing streets but also for their maintenance in the broadest sense, as in the case of oiling roadways for their preservation (O. C. C., Vol. V, p. 110) or controlling traffic to divert heavy loads from streets where the pavements are inadequate to carry such loads. It is conceivable even that the cost of clearing roadways of accumulation of substances which are injurious to pavements may properly be charged to the vehicle tax fund. This demonstrates what we have said before, that we cannot determine in advance without considering the merits of any expenditure whether it is justifiably chargeable to the vehicle tax fund."

Division 2 of Article 7 of the Roads and Bridges Act (Ill. Rev. Stat. 1963, ch. 121, pars. 7-201 through 7-204) sets forth the uses that municipalities can make of the Motor Fuel Tax Fund, including construction and maintenance of state highways, county highways, arterial streets within the municipality; and the construction or maintenance, but not the operation, of street lighting systems within the municipality. Section 7-202.9 (Ill. Rev. Stat. 1963, Ch. 121, Par. 6-202.9) permits the use of Motor Fuel Tax Funds not in excess of 50% of the total Motor Fuel Tax allocated to the municipality for the construction and maintenance of streets other than arterial streets or public highways.

Section 29-13 of the Municipal Code of Chicago, which deals with the allocation of revenues derived from vehicle licenses, provides that the same shall be "used for paying the cost of street and alley improvement, repair and maintenance."

With the foregoing provisions as a frame of reference, we now consider whether the specific items set forth in your letter fall within the ambit of "improving, paving, repairing and maintaining" the streets of the City and whether there is any specific statutory limitation against the use of the funds for the specific purpose, discussing each of the items separately.

"1. Could a percentage of refuse collection activity in the Corporate Fund, Bureau of Sanitation Budget (brooming of improved alleys by refuse collection loaders) be transferred to the Vehicle Tax Fund under the theory that this is preventive maintenance?"

It is our opinion that the "brooming of improved alleys by refuse collection loaders" may be shown to have a direct relationship to the maintenance of the streets and other public highways within the city and, therefore, the cost thereof could be charged to the Vehicle Tax Fund.

"2. Could 'Landscape Maintenance on Boulevards and Parkways,' in the Corporate Fund, Bureau of Forestry be charged against either the Vehicle Tax or Motor Fuel Tax Funds?"

It is our opinion that landscape maintenance, including the planting of trees, shrubbery and grass on city boulevards and parkways could be shown

to come within the statutory provision for the construction and maintenance of streets and public ways for the purpose of moisture retention, removing of obstacles to visibility and otherwise improving driving conditions on said boulevards, and could be properly charged against either the Vehicle Tax or the Motor Fuel Tax Fund.

"3. Electric Current for Street Lighting in the Bureau of Electricity, is presently budgeted \$1,833,530 from the Corporate Fund and \$935,000 from the Vehicle Tax Fund. Would it be possible to budget more to Vehicle Tax Fund and less to Corporate Fund?"

It is our opinion that the lighting of streets comes within the provisions of improving or maintaining the streets and other public highways within the City. Therefore, all of the costs thereof could legally be charged against the Vehicle Tax Fund.

"4. The City Collector's Office is presently budgeted \$719,072 in the Corporate Fund, and \$190,319 in the Vehicle Tax Fund. Could a portion of the Corporate Fund appropriation be transferred to the Vehicle Tax Fund?"

Section 8-11-4 of the Illinois Municipal Code of 1961 provides "that the actual cost of the collection of such fees and the disbursement thereof may be deducted from the total amount collected . . ." Therefore, that portion of the Funds budgeted to the City Collector's Office which relate directly to the collection and disbursement of the Vehicle Tax may be charged against the Vehicle Tax Fund.

Summarizing the foregoing, we are of the opinion that the actual cost of Items 1, 3 and 4 can be properly charged against the Vehicle Tax Fund and that Item 2 can be charged against either the Vehicle Tax or the Motor Fuel Tax Fund provided, however, that not more than 50% of the total Motor Fuel Tax allotment to the City be used for the construction or maintenance of streets other than arterial streets or state highways.

Section C. JUDGMENTS AND CLAIMS

CLAIMS AGAINST THE CITY OF CHICAGO

(Mayor—C. P. H.—March 14, 1961)

You will recall that considerable litigation arose out of the tragic fire at Our Lady of the Angels Parochial School fire of December 1, 1958, which took the lives of ninety two (92) children and three (3) nuns, and caused serious personal injuries to more than one hundred (100) children.

To date, the City of Chicago was sued jointly in twenty six (26) cases filed against The Catholic Bishop of Chicago, and The First National Bank of Chicago as Trustee of certain funds collected from the public for the benefit of the victims of the fire, in which damages in the aggregate sum of \$3,210,000.00 are sought.

In some of these cases certain City Officials also were sued individually. You were joined as a co-defendant as Mayor of the City of Chicago in one (1) case; the Fire Commissioner in four (4) cases; the Commissioner of Buildings in four (4) cases; the Division Fire Marshal in Charge of the Bureau of Fire Prevention in four (4) cases, and Timothy J. O'Connor, as Commissioner of Police in one (1) case.

We have been successful during the period from June 3, 1960, to March 10, 1961, in having the trial courts dismiss the City and its Officials as co-defendants in all of the twenty six (26) cases in which they were sued. These suits were brought for the deaths of twenty eight (28) children, and personal injuries to nine (9) children, alleged to have resulted from the fire.

All of the suits charged the City and the City Officials named as co-defendants, were negligent in failing to enforce the provisions of the Fire Prevention Code and the Building Code applicable to the school premises. On our motions, the courts dismissed the City and its Officials as co-defendants on the ground that they are not liable for the alleged non-enforcement of the ordinances under the doctrine of governmental immunity of the Common Law of the State of Illinois.

All of these suits, however, remain pending against the co-defendants, The Catholic Bishop of Chicago, and The First National Bank of Chicago as Trustee.

PAYMENT OF JUDGMENTS

(E. J.—C. P. H.—April 12, 1961)

Your letter of April 5, 1961, addressed to the Mayor, has been referred to this department for reply. You state that on February 5, 1960, you obtained a judgment against the City of Chicago for \$9,000.00 for injuries sustained by you. You make inquiry as to the reason you have not received payment of the judgment.

Under the law the City of Chicago is under a duty to pay judgments in the order in which they are rendered against the City by the Courts (Illinois Revised Statutes, 1959, Chap. 24, par. 22-14). Such judgments draw interest at the rate of five percent per annum from the date of the same until they are satisfied by payment (Ill. Rev. Statutes, Chap. 74, par. 3).

The office of the City Comptroller has estimated that sufficient funds should be on hand by November, 1961 with which to pay your judgment. Your attorney in this case will be notified when your judgment is ready for payment. We suggest that you communicate from time to time with your attorney.

ABANDONED AUTOS

(E. J.—C. P. H.—April 12, 1961)

In responding to your recent request for an opinion concerning the effect of House Bill No. 1660 in relation to the sale of abandoned automobiles, I submit to you the following:

House Bill No. 1660 amends Section 35-B-1 of "An Act in relation to Motor Vehicles . . ." Section 35-B-1 which is the section amended by House Bill No. 1660 applies only to motor vehicles which are appraised at a value not exceeding \$100.00. The effect of House Bill No. 1660, then, is to transfer jurisdiction with respect to the sale of abandoned automobiles which have been appraised at less than \$100.00 from the Police Department to the Purchasing Agent. There has been no change in the law in regard to motor vehicles which are appraised at a value in excess of \$100.00.

The Act in relation to motor vehicles in Section 35-A provides that abandoned, lost or stolen or unclaimed automobiles shall be delivered to a

municipal officer charged with the keeping of abandoned, lost or unclaimed property when such property shall be found within a municipality. Chapter 27 Section 423 of the Municipal Code of Chicago provides that it shall be the duty of the Commissioner of Police to safely keep any vehicle so impounded until such vehicle be repossessed by the owner or otherwise disposed of in accordance with the provisions of the Code.

Chapter 27 Section 429 provides that it shall be the duty of the Department of Police to sell the vehicles at public auction to the highest bidder.

Applying Section 35-d of the Act in relation to Motor Vehicles, which section applies to motor vehicles appraised in excess of \$100.00, it becomes the duty of that municipal officer who is designated to keep abandoned, lost or unclaimed property found in the municipality, namely Department of Police, to cause the sale of the motor vehicles in this classification at public auction to the highest bidder.

The second portion of your inquiry is answered in Section 35-F of the Act in relation to Motor Vehicles which reads as follows:

"The proceeds of any such sale, after paying all liens and deducting all reasonable charges and expenses incurred by any such municipal officer or sheriff charged with the keeping of abandoned, lost or stolen or unclaimed property in receiving, keeping, advertising for sale or selling or otherwise disposing of such motor vehicles, shall be paid into the treasury of the municipality or county as the case may be."

Obviously then, the answer to your second inquiry is that the expenses incurred in obtaining Certificates of Registration for \$1.00 and a Junker Title for \$1.00 may be deducted since they are clearly reasonable charges incurred in disposing of the motor vehicles.

STATUTE OF LIMITATIONS

(I. G.—C. N.—February 26, 1962)

We have your letter of January 10, 1962, in which you state that you already have paid \$700.00 on medical bills resulting from an accident in Chicago, on July 1, 1961, in which you sustained personal injuries necessitating an operation for broken ribs from which you have not yet fully recovered. Police investigation of the accident shows that you tripped over a slight rise in the sidewalk and fell against an iron rail located at the Parkway edge of the sidewalk. You state further that you are reluctant to bring suit and would like to make an amicable settlement of your claim.

We must inform you that, under the law governing personal injuries in the State of Illinois, such a suit is now outlawed, because you failed to give the required Statutory Notice to our municipality within 6 months of when the accident occurred. The only alternative to a suit would be by petitioning the City Council through a member of that body or the City Clerk—and there is no record of such a petition having been filed in your behalf.

In addition to all this, we believe there is no actual basis of liability attaching to the City, as the proximate cause of the accident was the presence of the rail around the parkway and your real action would lie against the abutting property owner, who unlawfully fenced in the City's parkway.

DAMAGE CAUSED BY CITY HALL FIRE

(Commission on Finance—C. N.—March 21, 1962)

The above claims were submitted to us by you for an opinion as to the City's liability.

Statement of Facts.

The above claims represent losses by City employees of miscellaneous articles said to have been damaged in a fire of undetermined origin, November 17, 1961, at the above site. These articles represent items temporarily stored in quarters usually used by claimants as regular City Hall workers. Because of the nature of their work, these employees had placed their clothing in receptacles provided therefor and donned attire indicating the type of work performed. In many respects these losses claimed are reminiscent of a former City Hall fire, on March 21, 1957. However, the previous fire was far more extensive as it destroyed the Council Chambers and other portions of the City Hall, whereas the fire herein considered was of lesser scope. Nevertheless, the present fire, as Honorable Joseph J. McDonough, Clerk of the Municipal Court, explains, was of the flash type and started in the immediate vicinity of the lockers used by the employees in the vault and, when the fire was first discovered, these lockers were totally engulfed in flame, making it impossible for the employees to retrieve their personal belongings.

Conclusion.

In various prior opinions on injuries and damages in the City Hall, including our opinion on Claim No. 9181, of May 25, 1936, for the Chairman of your Committee (a digest of which can be found on Page 478, Vol. XIX, Opinions of the Corporation Counsel and Assistants), we enunciated the rule that the City is not liable for injuries or damages sustained in the City Hall. We stated that the maintenance of a public building exclusively for municipal purposes is a governmental function, and the City is not liable for negligence in the performance of its governmental functions.

For the reasons therein fully set forth, we are of the opinion that no legal liability attaches to the City for the losses suffered by its employees in the City Hall fire.

In rendering this opinion we realize that many members of the City Council may feel that, despite the lack of legal liability, the City owes some form of moral obligation to its employees who met with these minor losses through no fault of their own. The total amount of these claims is approximately \$1,696.25. Because of the nature of the claims, in many instances the amount claimed represents original purchase price rather than present market value of the items. There is good reason to believe that no future claims will be presented for the same type of losses. In view of the extraordinary nature of these losses, if the City Council feels that some provision should be made for the City employees' misfortune, recompense should not be based upon a contention of liability on the City's part, but should be in the nature of satisfying these amounts claimed from some existing contingent fund, or one created by ordinance or resolution to cover the exceptional circumstances herein described.

We return your files herewith.

BACK BILLING

(Alderman, 47th Ward—B. M. K.—May 22, 1962)

In your letter of May 9, 1962, you request an opinion as to whether (1) the City can bill annual charges for electrical signs for all the years since the signs were erected and (2) whether in addition to this billing suits may be brought to impose a fine under the City code for failure to obtain a permit for the erection of these signs.

It is our opinion that the City may back bill for a period of five (5) years since there is a five year statute of limitations on any suit which might be brought to enforce an annual charge imposed by City Ordinance.

It is our opinion that suits for violation of an ordinance may be brought against persons who fail to take out permits but in this instance there is a limitation period of two years. The filing of a suit for the violation of an ordinance and the filing of a suit for back fees may both be pursued and no election of one remedy or another need be made by the City. Which remedy to pursue, or the decision to use both remedies, is made on the basis of the amount involved and the circumstances surrounding each case.

"OPEN-HOUSE FLY-IN"

(Commissioner, Department of Aviation—C. P. V.—August 8, 1962)

Your letter of July 30 requests our opinion concerning the legality of and the City's liability on the above cited proposal—provisionally entitled "General Aviation Days", sponsored by the Chicago Council for Progressive Aviation and Businesses.

We have obtained and considered the draft of a tentative program for the affair. It includes display of static exhibits, food and beverage service, possible helicopter and conventional aircraft sightseeing tours over the City, etc. The public would be invited. Private aircraft would be landed and parked for the weekend at the airport. It was suggested that aircraft parking fees be waived for participants.

We offer the following comments on the proposal:

(1) Absent a special contract, approved by the City Council, or other Council authorization, parking fees are not waivable. The recent amendment to Section 11, Chapter 37 of the Municipal Code (see J. P. C. C., June 29, 1962, pp. 7412-14) makes no provision for waiving this fee by unilateral executive action.

(2) The City's current comprehensive liability insurance policies would protect the City from actions arising from the proposed "Fly-in", except products liability on the sale of any articles at the airport.

(3) To protect the public where the City is not liable, it would seem prudent to require the program's sponsors to obtain comprehensive liability insurance, including products liability coverage if food or other products will be sold to the public.

(4) If it is intended that the program's participants will offer sightseeing tours to the public, their responsibility and authority to carry passengers (with or without fee) should be investigated, and insurance coverage for such activity should be secured by such carriers.

(5) If any space that would be occupied by the sponsors is presently under lease from the City to third parties, prior approval for use and occupancy of such space must be obtained from lessees.

(6) Approval of the Regional Administrator of the Federal Aviation Agency should be secured for any heavy aviation activity.

Prescinding from any operational matters, we find nothing legally objectionable to the proposal subject to the comments above.

LIABILITY FOR ACCIDENT AFTER ARREST

(Superintendent of Police—A. F. G.—October 3, 1962)

Your letter of September 4, 1962 is as follows:

Officers of this department frequently arrest persons who have an automobile in their possession at the time of the arrest. While department policy has been less than clear in this area over the years, the generally accepted practice is to tow all such automobiles to the auto pounds.

Where the automobile is involved in the offense in some manner, our policy of impounding the vehicle seems clearly to be correct. However, where the vehicle is not involved, such as where the defendant is stopped for a traffic violation and a routine radio name check reveals that we hold a misdemeanor warrant for him, we are not so certain that our policy is sound.

In such cases as that cited above, some police agencies permit the defendant to park and lock his car where he may retrieve it after he has posted bond, or where he can have a friend or relative pick it up.

Our questions on this problem may be simply stated as follows:

1. Does the Chicago Police Department assume responsibility for an automobile which is in the possession of an arrested person at time of his arrest.
2. If we assume that we are not responsible for such automobile, and we permit the defendant to park it on the street, are the arresting officer and the department liable for any damage to or loss from the vehicle while the defendant is in custody.

In answer to a similar request from the head of the police department in 1955 we sent an opinion which is reported in Vol. 24, Opinions of the Corporation Counsel at page 637, photostat of this opinion is hereto attached.

In that opinion we cited the doctrine that municipalities were immune from tort liability for injuries resulting from the negligence of its officers, employees or agents when engaged in the exercise of a governmental function, and also section 1-15, chapter 24, of the Cities and Villages Act, which modified that doctrine of immunity by providing that where injury results from the negligence of a policeman in the exercise of his duties, and judgment is obtained against him by the injured person, the municipality is required to indemnify the policeman for any amount he is required to pay on the judgment.

Since this opinion was written the Supreme Court of this state in 1959 in the *Moliter* case, 18 Ill. (2nd) 11, abolished the aforesaid doctrine. This decision increases the liability of the city, and leaves the statute which requires the city to indemnify policemen against whom judgments are entered still in effect.

The city is not responsible for cars parked on the city streets. If at the time of arrest a motorist's car is parked on a street without time limitation for parking, the car may be left there until he has furnished bond. If at the time of arrest he is driving his car, he may be directed to drive to the nearest police station accompanied by the arresting officer. If his car is parked in a meter zone he should be advised that it is subject to impounding and advised that it should be moved to a place where it may be safely parked. In none of these cases is the city liable for damages to the car.

LIABILITY OF CITY IN GENERAL

(City Attorney, City of Milwaukee—D. D. X.—October 17, 1962)

In reply to your recent letter in which you state that the Supreme Court of Wisconsin, in the case of *Holytz v. The City of Milwaukee*, 17 Wis. 2d 26, has wholly annulled the doctrine of governmental immunity from tort claims in your State, we wish to state that the opinion we hold in our Torts Division and in this office generally is that the doctrine has not been completely annulled in Illinois, and we believe that in the absence of wilful misconduct or of statute explicitly creating liability, sufficient immunity will always be retained providing for situations wherein the City acts purely in its governmental capacity in areas in which it is carrying out the police power of the State for the benefit of all the people in the protection of their lives, property and their health (as by the maintenance of police, fire and health departments by the City, for example).

In the decision of December 16, 1959, amending its earlier opinion of May, 1959, in the case of *Thomas Molitor v. Kaneland Community Unit (School) District No. 302*, 18 Ill. 2d 11, 163 N. E. 2d 89, the Supreme Court of Illinois held the School District liable for personal injuries sustained by the minor plaintiff when the school bus in which he was riding left the road, allegedly as a result of the driver's negligence, struck a culvert, exploded and burned. By this decision our Supreme Court specifically overruled both the leading case of *Kinnare v. City of Chicago*, 171 Ill. 332, decided in 1898, which case initially extended the immunity rule to school districts, and all subsequent decisions which followed the *Kinnare* case doctrine.

The Court in *Molitor* held further that the rule established in the case, " * * * except as to the plaintiff (*Molitor*), * * *, shall apply only to cases arising out of future occurrences * * *." The Court thus gave only prospective operation to the rule, except as to plaintiff, *Molitor*, on the theory that a decision overruling a substantial and long-existing line of authority " * * * should be given only prospective operation whenever injustice or hardship due to reliance on the overruled decisions would thereby be averted. * * *." (Citing cases.)

It is true that there is language in the majority opinion in *Molitor* which bespeaks the persuasion of certain members of the Court that the entire concept of governmental immunity is outmoded, anachronistic, a hang-over from medievalism, and that it should be abolished *in toto* as to all quasi-municipal entities, municipal corporations and other political subdivisions of the State. For obvious reasons, our position is to regard such pronouncements in the opinion as obiter dictum. We believe this view has been fortified by certain events, which are related farther along in this letter, and some decisions by our courts since the *Molitor* case, which have upheld the doctrine of governmental immunity. More particularly, in cases where the negligence attributed to the City is essentially that the City omitted to enforce one or another of its ordinances and plaintiff was injured allegedly as a consequence thereof, the response of the courts has been that the enforcement by a City of its ordinances is a governmental function, the exercise by the City of its enforcement power and function is discretionary in nature, and that a showing of non-

enforcement by a City of an ordinance, or ordinances, without more, will not render the City liable.

Molitor is a school case wherein the court, by the language of the opinion, definitely abolishes the doctrine of tort immunity of all schools, whatever be their nature or method of creation, whether public, eleemosynary, sectarian or private, and wherein the court explicitly overrules all prior contrary decisions. This we concede and are reconciled to, but it did not, in our opinion, abrogate the immunity of any other quasi-municipal corporation or body politic, nor of any other political subdivision of the State. The immunity as to municipalities and counties was initially adopted in Illinois in 1870 by the decision in *Town of Waltham v. Kemper*, 55 Ill. 346, and the court in *Molitor* does not overrule this case or subsequent cases constituting the long line of authority stemming from it.

Moreover, the first version of the *Molitor* decision of March, 1959, apparently provided the stimulus to our State legislature, to make changes in our statutes neutralizing its effects. Our Parks Act was amended by addition of Section 491 thereof, which declares that all Park Administrations and Park Districts shall have complete and entire immunity for any and all tort liability, personal injuries, property damage and alleged wrongful death (Approved and in force July 9, 1959). Our Forestry Act was likewise amended by Section 3a thereof, which specifically provides Forest Preserve Districts with like outright, complete immunity from tort liability (Approved July 22, 1959). Our Schools Act was amended as of the same date by Sections 821-831. In Section 821, the Illinois Legislature saw fit, apparently with a purpose to soften the blow of *Molitor*, to state formally the following admonitory provision:

"821. Public Policy § 1. The General Assembly finds, and hereby enacts as the public policy of the State of Illinois, that public schools in the exercise of purely governmental functions should be protected from excessive diversion of their funds for purposes not connected with their statutory functions if there is liability imposed by any court, and that there should be a reasonable distribution among the members of the public at large of the burden of individual loss from injuries incurred as a result of negligence in the conduct of school district affairs; * * *."

Said section also makes statement of the public policy in similar tenor respecting non-profit private schools conducted by bona fide eleemosynary or religious institutions, "and also that there should be a reasonable contribution * * * toward the alleviation of the burden of individual loss arising from injuries incurred as a result of negligence in the conduct of such non-profit private schools." Said Schools Act as amended now places a ceiling of \$10,000.00 damages "in each separate cause of action" against both public school districts and non-profit private schools. Our Counties Act also was amended by Section 301.1 (Tort Liability) whereby it is provided Counties must indemnify sheriffs or deputy sheriffs in an amount of " * * * not more than \$50,000.00 including costs of suit. * * * for negligence committed within the scope of his employment while engaged in the duties of his said employment." The Counties Act now also provides, by Section 429.7 (Liability Insurance), power for County Boards to insure their County against any loss or liability of any County officer, employee or agent resulting from the wrongful or negligent act of any such officer, employee or agent.

Admittedly, *Molitor* created something of a sensation or mild furor at the time the first version of the decision came down (March, 1959); rumor was rife that all governmental immunity was abolished in Illinois. The foregoing sequelae to the decision are described for such aid or guidance as they may be for you in dealing with the situation in Wisconsin.

The City of Chicago is self-insured for the greater proportion of its activities which give rise to tort liability. Payment of such liabilities is provided for by the City's Judgment Fund, the annual tax levy for which is "pegged" by statute presently at \$2,000,000.00 (Chicago does not have a large

measure of "home-rule"). Since this fund invariably is exhausted before the end of each year, it is replenished annually by including said amount in the City's yearly Appropriation Bill, or budget, which is passed by the City Council to take effect each January 1st.

A few remarks may be in order here regarding our procedure in handling tort claims, which are cleared through the Judgment Fund.

Since the statute provides that payments may be made out of the Judgment Fund only pursuant to a judgment entered by a Court of Record, it is necessary in the typical tort claim that the plaintiff file a suit for his recovery. Such suits may be filed in the Municipal Court of Chicago (jurisdiction in tort limited to \$10,000.00), the Circuit Court of Cook County or the Superior Court of Cook County (jurisdiction in tort not limited as to recovery amount), or in the County Court of Cook County (jurisdiction in tort limited to \$2,000.00 maximum).

In cases wherein the tort claim does not exceed \$200.00 (filing of lawsuit would be burdensome or work hardship), an alternative procedure is provided. The claimant in such instance may make demand for reimbursement for his out-of-pocket expenses or damage by simple request in writing, attaching his paid bills thereto, and presenting the same to his Alderman or to the City Clerk, as keeper of the records and proceedings of the City Council, either of whom may introduce a resolution that the Council pass the same for payment. After approval by the Committee on Finance of the Council and the Law Department, such resolutions are ordinarily passed as a matter of course at the next regular meeting of the Council and the claim is paid pursuant thereto by the City Comptroller.

The City does purchase insurance to cover those activities which are clearly in the nature of proprietary functions, of a business nature, and which are so distinguishable from the fact that the activity is revenue-producing. Prominent examples of such quasi-business functions are the ownership and operation by the City of its three municipal airports, its off-street automobile parking facilities and the Calumet Skyway, an express toll road within the City. Chicago's mass transit system is not owned or operated by the City government, but by a separate municipal corporation created some years ago by a special statute of the Illinois Legislature. The Chicago Transit Authority is largely self-insured, on much the same basis as is the City of Chicago. The C. T. A. and the City are the "largest" target-defendants in point of volume of suits filed against them arising out of the most common, mine-run, accident situations. Boarding, alighting and collision cases are the ordinary type of tort case in the traction system. Sidewalk and street cases comprise the largest categories in cases against the City. Currently and usually there are between four and five thousand tort cases pending against the City. We understand that the Chicago Transit Authority generally has almost double that number of pending tort files.

From the standpoint of tort liability of the City of Chicago, two of its Departments present special situations because they are dealt with specifically by statutes, namely, the Fire Department and the Police Department. In the case of the former, the City is made directly liable for torts occasioned by Fire Department vehicles and the City is sued directly in such cases. In the case of the Police Department, the statute provides that the City is indemnitor and shall indemnify the policeman if he is sued for his negligence and judgment is recovered. In this situation the suit is not against the City, but directly against the policeman, and theoretically, the City is liable to pay the policeman only after he had paid the judgment against him. As a practical matter, our Torts Division appears for and represents the policeman, and if judgment is had against him this Department certifies the same to the City Comptroller with direction that the judgment be paid by the City.

Wisconsin, we have understood, is a "Code" State which pioneered in, and has applied the doctrine of comparative negligence in its tort law. Illinois, conversely, is a "common-law" State, has not so far adopted compar-

active negligence, but has adhered to, and applies, the contributory negligence doctrine (Incidentally, the Negligence Law Committee of the Chicago Bar Association is the forum where now considerable debate is being carried on by proponents, on the one side, to bring about adoption of comparative negligence in tort-law in Illinois, and on the other side, ceiling amounts recoverable in injury cases and retention of the contributory negligence doctrine). Because of such divergencies and other differences which naturally exist between our States and your local situation and ours, and so precludes equating the two as identical, this letter has proceeded upon the premise that we could best answer your letter by setting down in narrative form what our experience has been in a situation similar to the one you now are dealing with, together with a description of some of our procedures which may point ways and means of some use to you. Statistics as to our litigation are embodied, we believe, in ready-reference form in the annual Reports of our Department and we are sending copies of the last several years Reports to you for use in making comparisons. It is anticipated that there will be no especially significant variance statistically between our operations during Calendar 1962, and prior years except for the ordinary increase in tort and other litigation which is universally the sign of the times.

Some recent Illinois tort cases with possible profit for you on the question of governmental immunity are:

Locigno v. City of Chicago, 32 Ill. App. 2d 412 (1961) (City's regulation of traffic is a governmental function) (City not liable for omission to erect traffic signs).

Adamczyk v. Zambelli and City of Chicago, 25 Ill. App. 2d 121 (1960) (Alleged failure of City to enforce ban on setting off firecracker explosives in street during parade and in proximity to crowds of people in attendance did not render City liable for injury).

Weiss v. City of Chicago, 23 Ill. App. 2d 280 (1959) (Minor child burned in alley rubbish fire—City not held liable for injuries).

See also *List, Administrator v. O'Connor*, 21 Ill. App. 2d 399 and 19 Ill. 2d 337 opinions (indicating tendency toward strict application of *Molitor* rule, but showing law in state of flux).

We trust that this material will be helpful to you.

LIQUIDATED CLAIMS

(*Commissioner of Aviation—R. L. H.—May 17, 1963*)

We are in receipt of your letter of February 13, 1963, wherein you request our opinion as to whether a proposal to settle an indebtedness of approximately \$18,000 for approximately \$2900 can be legally accepted by the City.

We have examined the settlement proposal, various other correspondence and materials, and the warrants for collection involved, and have also discussed this matter at length with your office in order to obtain the full and complete background information necessary to support an opinion pursuant to your request.

Tele-Trip Company, in its settlement proposal, offers to pay the City 25% of its gross sales at both Midway and O'Hare for the years 1961 and 1962 prior to the effective date of their current contract. Insofar as Midway is concerned, all rental fees having been paid for this period and there being nothing outstanding therefor, we see no reason whatsoever for including

Midway in any discussions of settlement of a debt owed for operations at O'Hare.

We now come to a discussion of the O'Hare operation giving rise to the present question. Pursuant to an agreement entered into in 1955 by and between the City of Chicago, through its Commissioner of Public Works, and Tele-Trip Company, Tele-Trip was authorized to render insurance services at O'Hare and was authorized to install insurance machines at the premises at O'Hare. This agreement also set forth that the rental payable to the City was to be the greater of either 13% of the gross sales or $\frac{3}{4}$ cents per enplaned passenger. From that time to the effective date of the current contract, the aforementioned rental was the rental in effect and payable by Tele-Trip to the City.

From our examination of the materials submitted to us, it appears that the warrants for collection were prepared pursuant to the terms of this agreement such that the total of the sums therein set forth appears to be not only liquidated, but also undisputed and overdue at this time. The law is quite settled to the effect that:

Where a claim is liquidated, not in dispute and overdue, payment by a debtor and acceptance by the creditor of a part only of the debt affords no consideration for an agreement by the creditor to discharge the unpaid balance of the debt; the creditor must receive some actual benefits which he would not otherwise have had. See, *Donahue v. Brooks*, 143 Ill. App. 188.

There being no evidence submitted to us of the presence of consideration to support the settlement proposal made by Tele-Trip, it is our opinion that said proposal must be rejected and they be advised to forward to the City Comptroller the sum of \$17,985.71 to liquidate the aforesaid warrants.

STATUTE OF LIMITATIONS

(*W. D. P.—J. O. T.—January 2, 1964*)

This office concurs with your opinion that the claim of Mrs. Layland for injuries, alleged to have occurred on December 7, 1962 due to an alleged defect in a sidewalk in front of 6959 West Archer Avenue, "was being filed too late to be honored."

The claim is barred by Ill. Rev. Stat. 1965, ch. 24, §1-4-1 and §1-4-2. Section 1-4-1 provides that no civil action for any injury to one's person shall be commenced unless it is commenced within one year of receipt or accrual. Section 1-4-2 provides that within six months from the date such injury was received or such cause of action accrued a signed statement must be filed with the City by the claimant, or his agent, setting forth the date, hour, and location of the injury, and the name and residence of the person injured and the attending physician, if any, and his address, along with the name of the person to whom the cause of action has accrued.

No power is delegated by the State of Illinois to the City or the Law Department to waive the provisions of these statutes. As a consequence, therefore, the legal duty of the Law Department is to oppose this claim and assert the statutory defense.

PROCESS FOR CLAIMS AGAINST THE CITY

(Mayor's Administrative Office—E. W. P.—August 21, 1964)

We acknowledge your letter of August 12, 1964, asking if there is any authority or appropriation to pay the bill dated July 31, 1964, which you enclose from the Congress of Racial Equality Unemployed Council Members of the North Side Freedom House at 317 West Evergreen, Chicago, Illinois.

The copy of the instrument attached, which bears the caption "A Bill For Work Completed," constitutes a petition for the payment of a claim or debt from the City of Chicago. The City Council as the governing body of the City processes hundreds of claims each year by reference to the Finance Committee. These cover a wide range of subjects and it is our opinion that the claim presented by C. O. R. E. should receive the same consideration as is afforded other claims. The claim could be presented either through your office, the office of the City Clerk, or through the Alderman of the Ward. This body has the authority, however, to satisfy or deny any claim with or without our approval. We have made some research, of which you will be advised in this letter, and we will make a further study when we are requested for an opinion from the Finance Committee based on any additional facts which they may submit, should you decide to process the claim through the Council.

The nature of the claim is unique. There appears to be no authority cited in the decisions which would sanction a claim as a contractual obligation. In the case of *De Leuw, et al. v. City of Joliet*, 327 Ill. App. 453, there is a great deal of discussion as to whether a recovery against the City of Joliet by the plaintiff should be on a *quantum meruit* basis for the services rendered in that case, and the facts show that the appellant was actually employed by the City Council of Joliet to do engineering services, but that the payment was to be made from the proceeds of a Federal loan and grant, which did not materialize. Preliminary services were performed and the Court held that the employment was legal and that the appellant was entitled to recover the reasonable value of his services through the General Corporate Fund. Again, in the case of *Hancock v. Village of Hazel Crest*, 318 Ill. App. 170, the plaintiff, a civil engineer, sued to recover the reasonable value of services rendered by him in connection with the proposed construction of a sewage system. There it was the contemplation of the parties that the proposed improvement would be paid out of revenue bonds, which were to be voted by a referendum. The vote was taken and was against the improvement and the village abandoned it. The contractor contended that there was an agreement for his services and that in the event the referendum was successful the amount would be paid from the proceeds of the revenue bonds, but nevertheless it was a contract for services and failure of the referendum made the work payable by operation of law out of the General Fund. The reason we cite this case is because of the discussion therein as to quasi contracts and contracts implied in fact. Both McQuillin and Williston are quoted on the subject of contractual obligations imposed by the law for the purpose of bringing about justice without reference to the intention of the parties.

It is our considered opinion therefore that, in order that this claim receive the full attention that it merits, it should be processed in the regular manner through the City Council.

DAMAGES CAUSED BY HEAVY TRAFFIC

*(Executive Secretary, Pilsen Neighbors Community Council—
E. W. P.—November 6, 1964)*

Your letter dated September 25, 1964, addressed to Hon. Richard J. Daley, Mayor of the City of Chicago, relating to the Canalport exit of the Dan Ryan Expressway, has been referred to this department for consideration and reply. You state that you a home at 2038 S. Ruble which because of heavy traffic has had its walls cracked. You request an opinion as to the City's responsibility in cases such as this.

Chap. 121, Paragraphs 8-101 through 8-109, of the Illinois Revised Statutes (1963) authorizes the designation and establishment of highways under their respective jurisdiction and control of the Department of Illinois, the County Board or the corporate authorities of any municipality with the authority to deny respective consents of adjoining property owners and to extinguish by purchase or condemnation all existing rights or easements from or over the freeway that may be vested in abutting land. It is our opinion based upon the powers of the governing body that there is no liability on the part of the municipality for the cracking of walls on private property because of heavy traffic. This authority of the municipality under the statute was confirmed in the case of *Department of Public Works and Buildings v. Lanter*, 413 Ill. 581.

EMPLOYEES INJURIES WHILE REPAIRING PARKING METERS

(Superintendent, Bureau of Parking—B. W.—January 19, 1965)

We reply to your letter of November 13, 1964 in regard to the liability of the Bureau of Parking or its Contractors as per letter of inquiry sent to you by the Duncan Parking Meter Maintenance Company.

Because of the considerable amount of legal research required in responding to an opinion of this nature our answer to your letter consequently has been delayed.

On November 20, 1964, pursuant to a telephone conversation with you we advised that no more permits be issued for the construction of heated sidewalks unless they have been approved by the Commissioner of Streets and Sanitation you informed me that you had already contacted Commissioner Johnson and that he had issued orders that no permits be issued for the construction of heated sidewalks unless and until blueprints have been furnished by the contractor. We believe that this policy should be followed on all future requests for permits for the construction of heated sidewalks.

Particularly referring to the specific inquiry at hand regarding meter numbers 709 and 711 in Area JEF, located at 5341 West Lawrence Avenue, Chicago, Illinois wherein these two meters were damaged as a result of an accident and where an installation crew was assigned to replace these meters and it was discovered that the sidewalk in which these meters were installed previously contained electrical wires imbedded in the cement we believe that the right course was pursued in not having these meters reinstalled. In the event that there was any injury sustained by these crew members or to the public pedestrians or motorists the City of Chicago could possibly be held liable for such injuries under these circumstances.

We call your attention to Section 27-415 of the Municipal Code of Chicago which provides as follows:

"the Commissioner of Streets and Sanitation shall cause meters to be installed in such numbers and such places in parking meter zones as established by the City Council as in his judgment may be necessary to the regulation, control and inspection of the parking of vehicles therein and shall cause parking-meter spaces to be so designated as hereinafter provided. He shall have supervision of the installation, operation, maintenance, regulation and use of such meters."

It is clear from the provisions of this section of the Municipal Code that the Commissioner of Streets and Sanitation has full power to control the installation and maintenance of all parking meters and provide and require any rules or regulations that will insure the safety of any installation crews that install, maintain or repair these meters as well as protection of pedestrians or motorists who may be injured as a result of coming into contact with meters that may become dangerous hazards as a result of contact with any hidden electrical wires under electrically heated sidewalks.

Specifically responding to your inquiry as to the liability of the Bureau of Parking an agency of the City of Chicago for injuries or property damage to any employee engaged in the re-installation of these damaged parking meters as set forth in your letter it is our considered judgment that the City would be liable particularly after notice of such dangerous condition has been given to your department.

Section D. BONDS

MUNICIPAL BUILDING BOND FUND

(A. L. W.—F. O.—March 29, 1961)

Returned herewith, in triplicate, is Contract No. 22128 together with our legal opinion relative thereto.

We acknowledge receipt of your letter dated March 23, 1961, wherein you request our opinion as to whether the Municipal Building Bond Fund of 1957 authorizes the use of funds therefrom to pay for alterations to heretofore existing buildings of the 40th Ward Yard located at 3512 W. Montrose.

Be advised that it is our opinion that these expenditures would be an improper charge to the said fund.

The ordinance authorizing the issuance of \$9,000,000.00 in Municipal Buildings Bonds reads as follows:

"Section 1. For the purpose of paying the cost of acquiring land and erecting and equipping thereon public buildings for the police department, fire department and street department of the City of Chicago there are authorized to be issued Municipal Buildings Bonds of the City of Chicago in the principal amount of \$9,000,000. * * *" (C. J. June 27, 1957, p. 5639).

The expenditures which can be made from this bond fund are for "acquiring land and erecting and equipping thereon public buildings" for the named departments. The question resolves itself as to whether or not the meaning of the phrase "acquiring land and erecting and equipping thereon public buildings" includes expenditures for alterations or improvements to public buildings, of the street department theretofore acquired or existing.

We think not. The ordinance looks to the future. It appears clearly to contemplate the utilization of the bond funds for acquisitions of future land and in conjunction with such land to permit expenditures for the erection and equipment of improvements, namely public buildings.

In *Clark v. City of Los Angeles*, 160 Cal. 30, 116 P. 722, 729, the Supreme Court of California was called upon to construe a charter provision authorizing the city of Los Angeles to supply the municipality and its inhabitants with electricity. The court, on rehearing, said: "It is not correct to say that the expression, 'acquiring and constructing a certain revenue producing municipal improvement,' particularly described, is necessarily a statement of a dual purpose. The word 'acquire' has a broad meaning, including both purchase and construction. The expression does not indicate the purpose of acquiring two systems, one by purchase, the other by construction. *In connection with the context*, it means the acquisition of but one system, including the purchase of such property and the erection of such structures as may be necessary to accomplish that purpose." (Emphasis added.)

Furthermore, we believe the proposed expenditures here cannot reasonably be said to be within the meaning of the word "land" in connection with the context of the ordinance, notwithstanding the broad meaning of the word land (24 Words & Phrases 133, Permanent Edition), since the word appears qualified and restricted to its common and usual meaning by the expression that public buildings be erected and equipped thereon.

For the foregoing reasons, we are of the opinion that the Municipal Buildings Bond Ordinance of 1957 does not authorize expenditures from Fund 443 for alterations to 40th Ward Yard buildings.

EFFECT OF RETURNING A BOND

(J. C. M.—E. R. H.—April 12, 1961)

We acknowledge your letter of April 10, 1961 attaching a copy of a letter under date of April 7, 1961 from the Department of Buildings and copies of bonds of the Able Trucking Company in the amounts of \$20,000.00 and \$40,000.00. You request an opinion as to whether or not your office could properly return the \$20,000.00 bond above referred to as requested by the Building Department.

Please be advised that it would not be proper for your office to return this bond, for the reason that such action would amount to a waiver or cancellation of the obligations of the instrument. It is not the practice of the City to return or cancel such bonds and it is not legally safe for it to do so. If such bond were returned there would be a hiatus in the obligation of the principal and surety between the date of the execution of the \$20,000.00 bond and the date of the execution of the \$40,000.00 bond.

BUILDING BONDS

(Commissioner of Public Works—J. G. O.—May 4, 1961)

We are in receipt of your letter dated April 10, 1961, in which you recite in part as follows:

"Proposals have been received and contract awards are now being processed for the construction of a communications center on the second floor of Central Police and Court Building. This work involves remodeling the entire second floor of said building, constructing a central com-

plaint room, electronic data processing quarters and the installation of radio, telephone and teletype equipment. The purpose of this improvement is to accelerate the receiving of complaints and dispatching of police personnel to troubled areas. The low bid was in the amount of \$192,446.00, to which must be added an additional approximate \$65,000 for electrical work.

There is a second phase to the improvements at this site which contemplates converting the existing police garage at 1101 South State into an office building for police purposes, together with acquiring the site and the construction of a 5-story annex between said existing garage building and the Central Police Station. The improvements also contemplate remodeling a portion of the first floor area of the existing Central Police Station, and the installation of air-conditioning facilities and other related equipment to serve all three buildings. It is estimated that this project would cost approximately \$1,750,000 and it is contemplated that the cost thereof be defrayed from the Municipal Building Bond Funds of 1957 and 1959."

You request that we advise you as to whether or not you may use the Municipal Building Bond Funds of 1957 and 1959 for the aforesaid improvements.

The ordinance authorizing the issuance of \$9,000,000 in Municipal Building Bonds of 1957 is as follows:

"Section 1. For the purpose of paying the cost of acquiring land and erecting and equipping thereon public buildings for the police department, fire department and street department of the City of Chicago there are authorized to be issued Municipal Building Bonds of the City of Chicago in the principal amount of \$9,000,000. * * *. (C. J. June 27, 1937, p. 5639.)

The 1959 ordinance authorizing the issuance of \$2,000,000. in Municipal Building Bonds is in part as follows:

"* * * for the purpose of paying the cost of constructing new Municipal Buildings for the police and fire departments of the City of Chicago * * *."

In view of the above, there is no legal objection to the expenditures of 1957 and 1959 Bond Funds for the aforesaid purposes.

ELECTRIC SIGN BONDS

(Administrative Assistant, Department of Buildings—E. W. P.—February 7, 1962)

We have your letter dated January 26, 1962, relating to the above matter. Your inquiry is predicated upon these facts: A Company is set up to erect signs and obtains a \$25,000.00 bond to hang signs within the City of Chicago. One of his customers orders an electric sign of the type which requires a \$15,000.00 individual bond, and the Company takes out this bond for the customer in the amount of \$15,000.00 (both bonds are perpetual). Two years later the customer decides to assume ownership and therefore responsibility for the sign and instructs his insurance agent to take out a new (substitute) sign bond with the City.

It is necessary before analysis of your questions to set forth the basic principle on the continuing liability of the bond principal and surety. This

has been the subject of many opinions from the Corporation Counsel's office throughout the years and is as follows:

"Under the provisions of the Revised Cities and Villages Act, it is necessary for a person commencing a civil action against the City on account of any injury to his person, to serve notice upon the City within six months from the date the cause of action accrued (Ill. Rev. Stat. 1949, ch. 24, par. 1-11). However, the courts have repeatedly held that these provisions of the act are not applicable to persons who are mentally or physically incapable of giving such notice to the City (*McDonald v. City of Spring Valley*, 285 Ill. 52; *Doerr v. City of Freeport*, 239 Ill. App. 560).

Under date of March 5, 1951, we rendered to your office our opinion in a similar case involving the Columbia Casualty Company's bond in connection with the construction and maintenance of a coal hole. In that opinion we stated:

"It follows that the City is unable to ascertain whether or not it will suffer losses on account of injuries to persons by reason of the construction and maintenance of the coal hole. If the City should sustain such losses, it would have a right of action against the Columbia Casualty Company under the provisions of the bond. Furthermore, in an opinion to the Commissioner of Buildings, dated March 2, 1942, we stated that the practice of returning or cancelling indemnity bonds filed with the City is not regarded as safe or proper. (Ops. of Corp. Coun., Vol. XXI, p. 50.)"

It is our opinion that you should not in any manner whatsoever

release the United States Fidelity and Guaranty Company of any of its obligations under the terms of the bond referred to in your letter."

On your statement of facts you address three questions. The first one is whether or not the second (substitute) principal on an electric sign requires two bonds, a \$25,000.00 bond and a \$15,000.00 bond, or only the latter bond, where two bonds were originally required. The Company who placed the \$25,000.00 bond to hang signs must maintain that bond regardless of the decision of the customer to assume ownership and responsibility for the sign. The customer is not engaged in the business to hang signs within the City of Chicago and the only bond that he needs to continue in force is the \$15,000.00 bond.

The second question that you propound is whether or not where a \$15,000.00 bond is not needed for an electric sign, or a non-illuminated billboard, does the second (substitute) principal need a \$25,000.00 bond? In this case you are assuming a different set of circumstances than the previous illustration. In the second question, in the event that the (substitute) principal desires to hang signs within the City of Chicago it would, of course, be required to furnish an initial \$25,000.00 bond.

The third question that you propound is whether or not when the principal still holds a \$25,000.00 sign-erecting bond, and another principal holds a \$15,000.00 sign bond for a certain location (which we assume to mean the same location) are both principals responsible for any action or accident in connection with the sign, or is only the latter principal responsible? It is our opinion that inasmuch as the \$25,000.00 bond taken out by the initial principal embraces all of its locations, then the first principal is responsible as is also the principal holding the \$15,000.00 sign bond for any action or accident concerned with the sign. The amount of the indemnity would be controlled by the extent of the action or accident and could be prorated between the principals, but the liability of bond principals would be for the full amount of the damages. Both of these bonds are continuous in their operation and there can be no deviation from liability on either the \$25,000.00 bond or the \$15,000.00 bond under Section 86.1-10 of the Code which provides as follows:

"Every person erecting, maintaining or removing illuminated signs shall submit to the commissioner of buildings, a bond, with sureties to be approved by the commissioner of buildings in the penal sum of twenty-five thousand dollars conditioned that such person shall faithfully comply with all the provisions and requirements of this chapter with respect to the alteration, location and safety of signs and for the payment of the original permit fees required by this chapter; and conditioned further to indemnify, save, and keep the city and its officials harmless from any claims, damages, liabilities, losses, actions, suits or judgments which may be presented, sustained, brought or obtained against the city or any of its officials because of the maintenance, alteration or removal of any illuminated signs, or by reason of any accidents, caused by or resulting therefrom. Individual annual \$15,000 bond for each sign will be required on items 8 and 9 under 86.1-6 above. . . ."

We believe that we have answered fully all of your inquiries. However, should there be any further question relating to these situations, please advise us.

FUNDS FROM SALE OF PARKING FACILITIES

(Acting City Comptroller—W. M. Z.—January 22, 1965)

Please refer to your letter of December 16, 1964 addressed to Mr. James G. O'Donohue, Acting Corporation Counsel, which reads as follows:

"On September 24, 1964 we wrote Mr. John C. Melaniphy as follows:

The Ordinance authorizing the Chicago Parking Facilities provides for the issuance of bonds according to Projects 1, 2, 3 and 4. However, from reading the Ordinance it appears that all of the bonds are of equal rank and it does not appear that it was the intention that bonds issued for any one of the projects are to be paid from the revenue derived from that particular project. It appears that the revenue from all facilities are to be used for paying the pro rata of all of the outstanding bonds which are subject to call during each year. It further substantiates our belief that no distinction is to be made between the various projects, as the fact is that on-street meter revenue is part of the Parking Facilities fund.

During the past year or two we have sold several Parking facilities and the question arises as to whether the proceeds of the sale of each specific facility must be applied to the purchase of bonds issued for the construction of the project of which the facility is a part. Accounting wise we have treated the proceeds of the sale of bonds as a credit to the sinking fund and we have apportioned such proceeds pro rata against all of the four projects.

In order that we may satisfy the auditors at the end of the year as to our policy it will be helpful if you will inform us whether it is proper for us to apportion the proceeds from the sale of any facility to the payment of bonds to all facilities or whether we must apply the full proceeds against the project of which the facility was a part. If we follow the first procedure, it would be possible that we would sell all the facilities on a given project at a loss so that there would be an amount due the bond holders covering bonds issued for the property without having any facilities in the project to produce an income to pay off the bonds.

Your early reply will be appreciated. Please submit your reply in duplicate so that a copy will be available for our auditors.

Inasmuch as the auditors have already started work with respect to our records for the year ending December 31, 1964, it would be helpful if we received an early reply to the above letter."

In reply to the above, may we state that we have examined the Parking Facility Revenue Bonds of Project A-1, A-2, A-3 and A-4. All bonds of all series expire on the same date and, among other portions, read as follows:

"This Bond is one of an issue of City of Chicago Parking Facility Revenue Bonds (hereinafter called the 'Bonds') of the City (unlimited in aggregate principal amount, except as may be otherwise provided in the Ordinance hereinafter mentioned), of the series and designation indicated on the face hereof, which issue of Bonds consists or may consist of one or more series, of varying denominations, dates, maturities, interest rates and other provisions as provided in the Ordinance hereinafter mentioned. All of the Bonds (of which this Bond is one) are issued and to be issued pursuant to the provisions of Chapter 24, Article 52.1 of the Illinois Revised Statutes 1951 (hereinafter called the 'Act'), and pursuant to an Ordinance of the City adopted September 18, 1952, as amended by Ordinance adopted December 1, 1952, authorizing the issuance of the Bonds (hereinafter called the 'Ordinance'). A copy of the Ordinance and amendment thereof is on file at the office of the City Clerk of the City, and reference is hereby made to the Ordinance and any and all amendments or supplements thereof and to the Act for a description of the terms on which the Bonds are issued and to be issued, the provisions with regard to sinking fund and reserve fund payments and with regard to the nature and extent of the Revenues of the parking facilities, as such terms are defined in the Ordinance, and of the rights of the holders and registered owners of the Bonds and of the bearers of the appurtenant coupons; and all the terms of the Ordinance are hereby incorporated herein and constitute a contract between the City and the registered owner of this Bond and to all the provisions thereof the registered owner hereof, by his acceptance of this Bond, hereby consents and agrees."

We have also examined the Ordinances applying to parking facility revenue bonds and find that the Ordinance referred to also treats the Parking Facility Revenue Bonds as one obligation whether the project is number A-1 or number A-3. It is, therefore, our opinion that all funds whether received from revenue or the sale of parking facilities be treated as assets of the entire program and not of each individual project. We suggest that when there is a sale of a parking facility or facilities, that the funds received be apportioned to the payment of bonds to all facilities.

USE OF SURPLUS FROM PARKING FACILITY BONDS

(Acting City Comptroller—S. R. D.—February 4, 1965)

We acknowledge receipt of your letter of January 19, 1965, stating that "The Surplus Revenue Account in the Chicago Parking Facilities Fund has a substantial credit balance and we should like, if possible, to call by lot approximately \$1,500,000 of additional Parking Facility Revenue Bonds as of July 1, 1965". You ask "whether we can use any portion of the Surplus Revenue Account (representing prior years accumulated earning above interest and sinking fund requirements) to make additional purchases of bonds by calling by lot".

Article IV of the Ordinance, authorizing the issuance of revenue bonds for acquisition, establishment, maintenance, and operation of parking facilities (C. J. 9-18-52, p. 3155), pertains to the redemption of Bonds of Series A. Section 4.01 provides as follows:

"Redemption of Bonds of Series A. The Bonds of Series A are redeemable before maturity at the prices and upon the terms set forth in Section 2.03 of Article II of this Ordinance.

"The City Comptroller shall determine by lot, in any manner deemed by him to be fair, the serial numbers of the Coupon Bonds to be redeemed, drawing the same from the serial numbers of outstanding Coupon Bonds and the serial numbers then reserved against outstanding registered bonds and shall certify to the Depositary the serial numbers so determined. Partial redemption of a registered bond shall be handled as set forth in Section 4.02 hereof.

"Each interest date, July 1, 1958 or later, when there is \$50,000.00 or more in the Sinking Fund, Series 'A' Bonds shall be called and redeemed so as to exhaust as near as possible all money in the Sinking Fund Account. The amount called shall be allocated as near as possible between bonds of the various projects financed by Series 'A' Bonds as the amount of each project bears to the total amount of Series 'A' Bonds outstanding."

Therefore, in order to use the \$1,500,000 now in the Surplus Revenue Account for the purpose of calling by lot of certain Bonds of Series A, it will be necessary to transfer the money from the Surplus Revenue Account to the Sinking Fund Account.

Section 5.09 (C. J. 9-18-52, p. 3158), pertains to the Sinking Fund for Bonds of Series A, and provides in part as follows:

"The Minimum Sinking Fund Payment for Bonds of Series A, exclusive of premiums for bonds called, if any, shall be as follows:."

(There then is listed in a column headed "Payment date ending July 1", beginning with the year 1963 and ending with the year 1982. There is another column headed "Accumulation Total Principal Amount of Bonds of Series A", and designating the accumulative amount of money to be paid in each year.)

The question, therefore, arises whether more than the "Minimum Sinking Fund Payment for Bonds of Series A" may be paid into the Sinking Fund in any given year. The word "minimum" is defined in 58 C. J. S., p. 806, as follows:

"The least possible quantity, amount, or degree that can be assigned in a given case under fixed conditions; of the smallest possible amount or degree; least; smallest."

In *Ruda v. Industrial Board* (1918), 283 Ill. 550, the court, in discussing the provision in the Workmen's Compensation Act "provided the minimum number of days which shall be so used for the basis of the year's work shall be not less than two hundred", said (pp. 553-554):

"It is a cardinal rule in construing statutes that they are to be construed so as to give effect to each word, clause and sentence, so that no word, clause or sentence shall be considered superfluous or void (*Crozer v. People*, 206 Ill. 464; *People v. Flynn*, 265 *id.* 414; 36 Cyc. 1128); and a statute should be so construed, if possible, as to give to each word and sentence its ordinary and accepted meaning (*Crozer v. People*, *supra*). The word 'minimum' is defined as 'the least possible quantity, amount or degree that can be assigned in a given case or under fixed conditions.' (New Standard Dict.; 27 Cyc. 793.)"

Applying the foregoing principles of law to Section 5.09 of the Ordinance, it is our opinion that you may transfer the \$1,500,000 now in the Surplus Revenue Account to the Sinking Fund Account and use the same for the purpose of redeeming the Bonds of Series A as provided in Article IV of the Ordinance.

TERMINATION OF SURETY BONDS

(Purchasing Agent—J. E. S.—June 15, 1965)

Your recent letter with attachments thereto requests of this department approval of a release of \$200,000 to the contractor from a reserve presently being held by the City approximating \$250,000. This department recognizes that the equities may well run in favor of the contractor in this matter but pending submission to and approval of the proposal as factually detailed to the Surety under the Performance Bond, permission therefor must at this time be withheld.

It is the opinion of this department that the requested pay-out, in the absence of knowledge and consent by the Surety, might well serve to discharge said Surety from the obligations assumed under the Performance Bond.

It is further suggested that in addition to the foregoing it be determined that the contract proper be presently free of claims of subcontractors and of the work remaining sufficient funds be retained, or other protection afforded, to cover the value of work to be performed by subcontractors, suppliers and materialmen, if any, who may be granted rights under Section 23, Chapter 82, Ill. Rev. Stats. 1963.

This department would be pleased to assist further in the resolution of this matter, if desired.

AIRPORT BONDS

(Acting City Comptroller—M. E. A.—August 30, 1965)

Reference is made to your letter of July 21, 1965, in which you request our opinion as to the disposition of the above-mentioned 25% excess revenue received by the City. You have suggested that based on your auditor's viewpoint, it is your opinion that "the 125% is for budgetary purposes only and that, only until the *minimum flight fee* is reached, all revenue in excess of actual minimum sinking fund requirements set out in the ordinance and actual interest payments must be credited to deferred credits to reduce future flight fees." We have found no support in the ordinance or agreement for your position.

George R. Smith of Glore Forgan, Wm. R. Staats Inc., states that it is their opinion that "the city should retain such excess revenues resulting from the 25% excess coverage of principal and interest requirements and apply them to the accelerated retirement of the outstanding bonds". Mr. Smith sets forth the reasons for his opinion which appear to be quite sound.

Mr. Smith sets forth his reasoning in the following manner:

"During all the formative stages of the financing program, the basic conception of the amount that the Airlines would pay to the City was such amount as would pay the Maintenance and Operation costs of the Airport and all other sundry items or cost that are included in the definition of Airport Expenses in the Airport Use Agreement including (beginning with the fiscal year 1962) 1.25 times the Principal and Interest Requirements on the outstanding Approval Revenue Bonds.

The source of these total Revenues was to be from the fixed rentals paid by the various Airlines under the various leases, the revenues from all concessions at the Airport, and the Flight Fees to be paid by the Airlines. The term Revenues by definition on page 3 of the Bond Ordinance does not include any interest accruing on or any profit resulting from the investment of moneys in the Reserve Maintenance Account or the Emergency Reserve Account.

Whenever, in any fiscal year, the sum of Flight Fees paid by the Airlines together with all revenue from any other sources, amounts to a figure in excess of the Airport Expense for such fiscal year as defined in Section 15.07(1) of the Airport Use Agreement (which includes, commencing with the fiscal year January 1, 1962, 1.25 times the Principal and Interest Requirements on the outstanding Approved Revenue Bonds) such excess is to be treated as deferred income and included in the Revenues of the succeeding fiscal year in calculating the new Flight Fee for said year".

Section 503 of the Bond Ordinance concerns the disposition to the various accounts in the Revenue Fund of the revenues received by the City. Section 503(2), subparagraph 6, reads in part as follows:

"*Sixth:* To the extent that Revenues accrued during each fiscal year, as shown in the audited statement of the Independent Certified Public Accountants, referred to in Section 6.08, exceed Airport Expense for such fiscal year, as defined in Section 15.07(1) of the Airport Use Agreement, such excess shall be considered deferred income and as Revenues of the next succeeding year for all purposes of this Ordinance.

All revenues accrued during the fiscal year for which such audited statement is rendered, which revenues have not been *allocated for Operation and Maintenance Expenses*, nor deposited or allocated for deposit in the several Accounts set forth in this Section 5.03(2) *First through Fifth*, inclusive, nor considered revenues of the next succeeding fiscal year, shall be allocated to the Sinking Fund and deposited therein as soon as practicable.

Notwithstanding the foregoing, in any fiscal year in which the *minimum* Flight Fee is in effect as provided in the Airport Use Agreement, all revenues accrued during such fiscal year in excess of the required allocations to Operation and Maintenance Expenses and the Accounts provided for in this Section 5.03(2), *First through Fifth*, inclusive, shall be allocated to the Sinking Fund."

Mr. Smith contends that the above quoted portion of Section 503 indicate that it is the intent of the Bond Ordinance and Agreement that in any fiscal year the amount to be considered as deferred income and as revenues of a succeeding fiscal year would be "only that amount by which the total revenues for such fiscal year exceeds the total airport expense as defined in the Airport Use Agreement". He correctly concludes that the practical effect of this would mean that "in each year the City should end up with surplus revenues after the payment of their interest requirements and minimum sinking fund requirements for the fiscal year with an amount equal to 25% of said requirements". Mr. Smith also notes that on the top of page 21 of the City's Official Statement for the \$120,000,000.00 Chicago O'Hare International Airport Revenue Bonds, the statement is made that the bond issue could be retired by January 1, 1986 through the application of such excess revenues. He further notes that the aforementioned statement "could only have meaning if it was intended that the City should retain such excess revenues resulting from the 25% excess coverage of the Principal and Interest Requirements and apply them to the accelerated retirement of the outstanding bonds".

Mr. Smith agrees also that nowhere in the Bond Ordinance or Agreement is there any authority for the City to treat this excess 25% as deferred

income and as revenues of the next succeeding fiscal year in calculating the new flight fee.

Mr. Harold W. Voss of Municipal Research Associates, reaches the same conclusion as Mr. Smith. He states in part:

"Thus, the sum received from the charge of 125% of debt service is to be applied in each year to the requirements of the interest account, the debt service reserve account, to the minimum sinking fund payments, and with any balance also to be paid into the sinking fund.

On the three bond issues now outstanding, level debt service payments at 100% totalling \$8,903,620 per year, would retire all bonds at maturity in 1999, by providing the minimum sinking fund payments specified and interest charges based on retirement of bonds at the rate provided by the minimum sinking fund allocations. However, the City is collecting 125% of this amount, \$11,130,923 in each year and will continue to collect this same amount in each subsequent year, without change, until all present bond issues are retired (but subject to pro rata increase if additional bonds are issued). Since the amount is designated Airport Expense, the excess over the sum of interest charges and minimum sinking fund payments in each year is not deferred income but is to be allocated to the sinking fund and will accelerate the final redemption of bonds. The effect is to render the minimum sinking fund payments provided for in Section 5.03(a) Third meaningless, for in every year required transfers to the sinking fund will substantially exceed the minimums."

After examining the Bond Ordinance and Agreement, in particular the sections noted by Mr. Smith and Mr. Voss, we reach the same conclusion that this 25% excess should go into the sinking fund rather than be treated as deferred credits to reduce future flight fees.

BOND PROCEEDS APPLIED

(Commissioner of Streets and Sanitation—J. E. S.—January 12, 1967)

In your recent letter you requested the opinion of this department on the following questions:

1. Is it legal to continue to issue work to the above cited contractor under Contract No. 21653?
2. If so, may the work be completed to a previously estimated amount under said contract, as originally bid, of \$3,756,881.75?
3. In June 1966, the voters approved a bond issue in the amount of Twenty Million Dollars for improving, extending, and equipping the electric lighting system in the streets and alleys. If additional work is authorized, may some of the work be paid for from funds obtained through the bond issue of 1966?

Answering the first question posed above, attached to your letter as Exhibit 10, is a letter dated October 6, 1965, from the Department of Purchases, Contracts and Supplies, wherein the Purchasing Agent indicated that it would be in the best interest of the City with the prices quoted in subject contract to keep the contract open and further authorized you to execute sub-orders against this contract. This department has been orally advised

by your department that the fact situation as discussed in said letter has not been altered as of this date and that it is yet your desire to keep said contract open. Consequently, we would find nothing objectionable if the contract were continued to remain open, suggesting only that an amendment in proper form be executed. (See 33 Comp. Gen. 90.)

Accordingly, answering the second question posed, after execution of the amendment above referred to, the work yet remaining incomplete under said contract may be completed in strict compliance with the plans, specifications and terms contained in said contract documents.

Answering the third question posed, it has been stated:

"The proceeds of bonds sold by a municipality, including premiums obtained by the sale of bonds, must be applied to the purposes for which the bonds were issued and sold * * * and, unless so provided by statute (ordinance) such funds may not be validly diverted to other purposes or uses." (See 15 McQuillin, *Municipal Corporations*, Sec. 43.68.)

Since approval of the bond issue at the referendum on June 14, 1966, the City Council of the City of Chicago authorized on July 11, 1966 (C. J. P. 6970) and also on November 28, 1966 (C. J. P. 7550) the issuance of electric lighting system bonds therein stated amounts for the purpose of paying the cost of improving, extending and equipping the electric lighting system in the streets and alleys of the City. Consequently, this department would find nothing objectionable if the proceeds from said bonds were used as a source of funds to pay for the cost of improving, extending and equipping that part of the electric lighting system described in the above cited contract, if that is what is desired, provided only that said proceeds be utilized only for the payment of costs incurred subsequent to the date thereof. (See *People v. Hummel*, 215 Ill. 43.)

If this department may be of further assistance in this matter do not hesitate to so advise.

PUBLIC TRANSPORTATION BOND ISSUE

(Commissioner of Public Works—T. A. F.—January 17, 1967)

Reference is made to your request for a legal opinion relative to an application by the City of Chicago for federal financial assistance under the Mass Transportation Act of 1964 for the construction of a Rapid Transit facility in the median strip of the Dan Ryan Expressway to the outer terminal at or near West 95th Street in Chicago, Illinois.

The City of Chicago is a municipal corporation having a population in excess of 3,000,000 people, incorporated by an act to incorporate the City of Chicago, approved March 4, 1837, and that on April 23, 1875, the erectors of the City of Chicago, voted to adopt and become incorporated under an act entitled "An Act to Provide for the Incorporation of Cities and Villages," approved April 10, 1872, and in force and effect July 1, 1872 as subsequently amended.

Pursuant to Chapter 24, Section 11-121-1 of the 1965 Illinois Revised Statutes, the City of Chicago was authorized to construct any extensions to the transportation system for use in connection with or collateral to the operation and maintenance of said system. Further, pursuant to the aforesaid statutory provision, the City of Chicago has the power to contract with the Chicago Transit Authority for the operation of a transportation system.

Pursuant to Chapter 24—Section 11-121-4 and Chapter 111½, Section 315 of the Illinois Revised Statutes, the City of Chicago and the Chicago Transit Authority are authorized to contract for and receive federal grants for extension of the City transportation system.

The City's cost of one-third of the total project cost shall be paid from the proceeds of a Public Transportation Bond Issue in the sum of \$28,000,000, which was approved through a referendum on June 14, 1966, and authorized by the provisions of Chapter 24, Section 11-121-4 of the Illinois Revised Statutes (1965).

The City of Chicago has by ordinance of the City Council of the City of Chicago duly adopted on the 14th day of October, 1966, authorized the expenditure from the said Twenty-Eight Million Dollar Public Transportation Bond Issue of the one-third cost for the proposed improvement; said ordinance was regularly adopted and in accordance with the legal authority provided by statute.

To my knowledge, there is no pending or threatened litigation of any kind concerning the project as hereinabove described.

CHAPTER XI—CITY PROPERTY

Section A. REAL ESTATE

SECTARIAN RELIGIOUS MEMORIALS

(*Alderman, 5th Ward—E. W. P.—January 30, 1961*)

We have your letter of January 16, 1961, which reads as follows :

“This is a formal request for a legal opinion on the right of the city to permit a sectarian religious statue on city property.

“On June 14, 1959, there was erected and dedicated on city property a statue of a figure intended to depict ‘St. Michael the Archangel.’ The statue was dedicated by St. Michael Post No. 201, Catholic War Veterans, then located at 1633 North Cleveland Avenue. The location of the statue is on property owned by the city in the triangle formed by Ogden, Cleveland and Eugenie Avenues.

“The figure itself is a stone figure of an angel with wings. On the stone pedestal which supports the angel is the following inscription :

‘St. Michael (a cross) Archangel Assist Us In Our Battles
Against the Evils of the Day’

Then appears a large cross, and after it the following words :

‘Our Dead Are Not Unknown Soldiers. (small cross) We
Know Who They Are And Whither They Seek To Go

Dedicated
To The Glory Of God

By
St. Michael Post No. 201
Catholic War Veterans
U. S. A.

June 14, 1959’

“A religious inscription of an inter-denominational character appears on the reverse side of the pedestal.

“Does the city have authority to erect sectarian religious statues on its property? Does the city have authority to permit the erection or maintenance of a sectarian religious statue on its property?”

In *Reichwald v. Catholic Bishop of Chicago*, 258 Ill. 44, a suit was filed by a taxpayer in behalf of all the taxpayers to enjoin the Board of Commissioners of Cook County from the erection of a building for religious worship upon the grounds owned by the County of Cook used as a poor farm. The

erecting of the chapel was to be at the expense of the Catholic Bishop of Chicago. A demurrer was sustained to the bill and the suit was dismissed and there was an appeal to the Supreme Court. In the opinion, page 47, the Court said:

"The constitution prohibits the county from giving the land to the church, but there is no prohibition against the church giving the building to the county, . . . May the county permit the use of the building for religious worship and funeral services? . . . The constitution does not absolutely prohibit the exercise of religion, but, on the contrary, provides that the free exercise and enjoyment of religious profession and worship, without discrimination, shall be forever guaranteed. No person can be required to attend or support any ministry or place of worship against his consent, and no preference can be given by law to any religious denomination or mode of worship. This does not mean that religion is abolished. . . In *Nichols v. School Directors*, 93 Ill. 61, a law was held to be within the constitutional power of the legislature which gave to school directors the right to grant the temporary use of school houses, when not occupied by schools, for religious meetings and Sunday schools, for evening schools and for literally societies, and for such other meetings as the directors may deem proper, and the action of school directors was sustained giving permission to different church organizations to hold religious services in the school house."

In our opinion these decisions, and principle, justifies the right of the City to permit the described statue on City property. The statue, as it is described, religious in its nature, is also a memorial to veterans, who gave their lives so that our Freedom shall live.

FUNDS FROM SALE OF CITY PROPERTY

(City Comptroller)—J. C. M.—September 18, 1961)

Hon. J. J. McDonough, the then Acting Comptroller, wrote us inquiring as to the disposition of proceeds from the sale of property at 31st Street and LaSalle (formerly used by the Department of Streets and Sanitation) and 64th and Wentworth Ave. (used as a fire alarm office).

In previous years where fire stations have been disposed of because of condemnation proceedings in connection with the construction of Congress Street, the proceeds have been held in a special account to provide substituted facilities. There always appeared to be an emergency for a new fire station.

It is our opinion that funds received from the sale of City property of whatever nature should go into the General Corporate Account. Experience has shown that there is no emergency in constructing substituted facilities. The Department effected should provide for an appropriation in the annual appropriation ordinance for any new building.

In the event, however, the Water Department should receive compensation for the sale of a building erected out of Water Funds, which are trust funds, such compensation should be paid into the Water Fund.

CONVEYANCES—EFFECT OF POSSIBILITIES AND POWERS

(City Comptroller—H. S.—January 29, 1962)

This is to acknowledge receipt of your letter of January 17, 1962, relative to the above subject wherein you requested advise as to whether the City of Chicago has sufficient title in said premises to lease or sell the same.

You advised us that Walter C. Newberry, et al., conveyed the title to the Town of Lake, a Municipal Corporation, by warranty deed recorded March 30, 1889, subject to the following conditions:

"in consideration of the sum of one (\$1.00) Dollar, in hand paid, and in further consideration of an agreement, entered into by the said party of the second part for the erection of buildings upon the premises herein-after mentioned, for the purposes of a Police and Fire Station, said buildings to cost not less than the sum of \$20,000,000."

The deed also contained the following:

"It is expressly understood and agreed by and between the parties to these presents, that in case the property hereby conveyed should at any time cease to be used by the said party of the second part, or their successors, for *municipal purposes*, then and in that case, the title to said property shall revert to said parties of the first part, or their heirs, executors, administrators or assigns, and become vested in them as fully to all intents and purposes as if this conveyance had not been made."

We consulted the statutes relative to the laws affecting "reverter rights" and find that Sections 37e, 37f and 37f1 of Chapter 30, Illinois Revised Statutes 1961, provide as follows:

37e-4. "Neither possibilities of reverter nor rights of entry or re-entry for breach of condition subsequent, whether heretofore or hereafter created, where the condition has not been broken, shall be valid for a longer period than 40 years from the date of the creation of the condition or possibility of reverter. If such a possibility of reverter or right of entry or re-entry is created to endure for a longer period than 40 years, it shall be valid for 40 years." As amended by act approved July 8, 1959. L. 1959, p. 579.

37f-5. "If by reason of a possibility of reverter created more than fifty years prior to the effective date of this Act, reverter has come into existence prior to the time of the effective date of this Act, no person shall commence an action for the recovery of the land or any part thereof based upon such possibility of reverter, after one year from the effective date of this Act."

"If by reason of a breach of condition subsequent created more than fifty years prior to the effective date of this Act, a right of re-entry has come into existence prior to the time of the effective date of this Act, no person shall commence an action for the recovery of the land or any part thereof based upon such right of entry or re-entry after one year from the effective date of this Act, unless entry or re-entry has been actually made to enforce said right before the expiration of such year."

37f-1 s 5a. "If by reason of a possibility of reverter created more than 40 years prior to the effective date of this amendatory Act, a reverter has come into existence prior to the time of the effective date of this amendatory Act, no person shall commence an action for the recovery of the land or any part thereof based upon such possibility of reverter, after one year from the effective date of this amendatory Act."

"If by reason of a breach of condition subsequent created more than 40 years prior to the effective date of this amendatory Act, no person shall commence an action for the recovery of the land or any part thereof based upon such right of entry or re-entry after one year from the effective date of this amendatory Act, unless entry or re-entry has been actually made to enforce said right before the expiration of such year. Added by act approved July 8, 1959." L. 1959, p. 579.

On consulting decisions of the Supreme Court affecting the foregoing provisions we found the following: In the case of *Trustees of Schools v. Batdorf*, 6 Ill. 2d p. 486, the Court held as follows:

(Opinion filed October 26, 1955.)

1. Deeds—*a possibility of reverter is subject to change by statute.* "Although a possibility of reverter can pass by descent, it is incapable of alienation, devise or partition and until the limiting contingency occurs it is no more than an expectation that an interest in property may accrue in the future, and it is subject to change, modification or abolition by legislative action."

2. Schools—*statutory provision limiting possibilities of reverter is valid.* "The provision of the so-called Reverter Act of 1947, limiting to fifty years the period of expectancy of an interest created by a provision for re-entry on breach of a condition subsequent, is valid, and will operate to vest in school trustees the title to school land by a conveyance more than fifty years prior to the fulfillment of the condition of re-entry, and where the condition has been fulfilled within the statutory period, prior to the date of the act, the re-entry must be enforced within a year after the act took effect."

3. Same—*section 5 of the Reverter Act of 1947 is valid.* "Section 5 of the so-called Reverter Act of 1947, in requiring to be brought within one year any action for recovery of land under a possibility of reverter where the condition of re-entry had taken place prior to the effective date of the act, does not abolish or change any established or vested right, but it merely modifies the procedure for enforcing the right by shortening the period in which suit may be brought."

In the case of *Blackert v. Dugosh*, 12 Ill. 2d p. 171, the Court held as follows:

3. Same—*when conveyance for school purposes does not revert.* "A conveyance of a certain described $\frac{1}{2}$ -acre tract 'so long as said lot is used for school purposes' with no present or vested interest left in the grantor or his heirs, creates a base or determinable fee with, at most, only a naked possibility of reverter, and where the abandonment for school purposes occurred long after the expiration of the 50 year period provided in section 4 of the Reverter Act, any possibility of reverter must be held to have been extinguished."

From the foregoing decisions of the Supreme Court it appears that all reversionary rights in the heirs of Newberry et al., were extinguished at least 50 years subsequent to 1889 and that based on these decisions and the statute above quoted it appears that the city, as legal successor by annexation of the Town of Lake, has the right to dispose of the above described premises.

However, there is always a possibility of subsequent decisions wherein the Supreme Court may hold otherwise in other litigation and because of that possibility, it is our opinion that the city ought not to sell this property by warranty deed but should advertise the same for bids by stating in the advertisement that the city is offering to "sell all the right, title and interest of the City of Chicago in said premises by a quit claim deed" to any purchaser submitting the required bid.

LAKEFRONT ORDINANCE

(Alderman, 5th Ward—S. R. D.—April 24, 1962)

We acknowledge receipt of your letter of April 18, 1962 requesting our opinion as to certain specific questions in connection with the pending ordinances on the Interstate Investment Company lakefront building. We will chronologically answer your questions.

First, you ask "What obligations of the Illinois Central under the Lakefront Ordinance of 1918 remain unperformed?"

The Lake Front Ordinance was passed July 21, 1919 (C. J. 969-1001). As amended, it comprises a comprehensive plan for the development of the lake front east of Michigan Boulevard and extending from the south bank of the Chicago River south to E. 47th Street. Although the Lake Front Ordinance, as amended, provided for numerous undertakings by the Illinois Central and Michigan Central Railroads, Chicago Park District and its predecessors and the City of Chicago, the only present obligations of the Illinois Central Railroad under the ordinance are:

(a) The construction of the north half of the Randolph Street viaduct at the same time and contemporaneous with the construction of the south 8 feet of the south half of the Randolph Street viaduct by the Chicago Park District; and

(b) The construction of a new passenger station north of E. 16th Street, subject to the provisions of the ordinance.

Second, you ask "To what extent do the pending ordinances and the agreements authorized under them provide for performance of any such obligations?"

The present ordinances pertain to the creation of an easement over, upon and under the Illinois Central right-of-way for the construction of a sanitary sewer and a storm water sewer which will service the proposed high rise building to be located at the northeast corner of Field Boulevard and E. Randolph Street, as extended.

It is apparent that the Lake Front Ordinance has no bearing upon the pending ordinances. The pending ordinances, therefore, contain no provisions relative to the obligations of the Illinois Central Railroad under the Lake Front Ordinances.

Thirdly, you ask "Have you or has the city administration made any effort to obtain a commitment from the Illinois Central that, with reference to its property between Randolph and Roosevelt Road, it will acquiesce in the Montgomery Ward decision?"

The *Ward* cases [*City of Chicago v. Ward* (1897), 169 Ill. 392; *Bliss v. Ward* (1902), 198 Ill. 104; *Ward v. Field Museum* (1909), 241 Ill. 496; *South Park Comrs. v. Ward & Co.* (1911), 248 Ill. 299] pertained to the public ground on the east side of Michigan Avenue from the north line of Randolph Street to the south line of Park Row [Roosevelt Road] and commonly known as Lake Park [Grant Park]. *City of Chicago v. Ward* (1897), 169 Ill. 392, 396. The rights involved in the *Ward* cases arose by way of dedication. The rights involved in the Lake Front Ordinances arose by way of contract. Opinions of the Corporation Counsel, Vol. 23, p. 1. The *Ward* cases, therefore, have no application to either the Lake Front Ordinances or the pending ordinances.

POSSIBLE REVERTER'S RIGHTS

(City Comptroller—H. S.—April 30, 1962)

We are in receipt of a letter from Wilson & McIlvaine, attorneys for Field Enterprises, Inc. informing us of the purchase by Field Enterprises from the North Western Railroad, of certain properties in the vicinity mentioned above, for the construction of a paper processing plant.

They advised us that the Chicago Title and Trust Company, in examining title to the premises involved, raised a question relative to the possible Reversionary Rights of the City of Chicago in certain streets and alleys vacated by an ordinance of the City Council of the City of Chicago in 1861, which ordinance attempted to reserve certain rights in the City of Chicago as to the use of the streets and alleys so vacated, resulting in a cloud on the title to said premises.

Said ordinance of 1861 is as follows:

"Be it ordained by the Common Council of the City of Chicago:

Section 1. That so much of Fourth (Ohio) Street as lies between the East line of Desplaines Street and the West line of Jefferson Street; also so much of Jefferson Street as lies between the North line of West Indiana Street and the North line of Fourth (Ohio) Street; also so much of Water Street as lies between the South line of Indiana Street and the North line of Cook Street, and from the North line of Indiana Street to Jefferson Street; also the Alley running North from Indiana Street to the North Branch of the Chicago River between Desplaines Street and Jefferson Street; also the Alley between Lots 17 and 18 and Lots 7 and 8 in Waubansia Addition; also the Alley running East and West, North and adjoining Lot 11 in Block 61 in Russell, Mather and Roberts' Addition to Chicago, be and the same are hereby vacated and discontinued: Provided however, that such vacation and discontinuance shall continue only so long as they may be used for railroad depot purposes and no longer: Provided further, that the City authorities shall have the right to enter upon any or such portions of said Streets and Alleys as they shall deem necessary for the purpose of laying down or repairing water pipes or sewers or either.

Section 2. That the Mayor and Comptroller shall execute and deliver in behalf of the City, such proper conveyance as may be necessary to convey to the Chicago and North Western Railroad Company so much of the right and title of said City to said streets and alleys hereby vacated, as is contemplated by the provisions of this ordinance, and subject to all the conditions in this ordinance prescribed.

Section 3. That if the Said Chicago and North Western Railroad Company shall, at any time, cease to use for railroad depot purposes the Streets and Alleys that are hereby vacated, or if said Railroad Company shall at any time hereafter refuse or neglect to immediately pay over to said City of Chicago any and all amount of moneys it may be judicially determined that said City should pay as damages or costs, by reason of the property of any person or persons being damaged by reason of the vacation and discontinuance of such streets and alleys, then such streets and alleys shall immediately revert to the said City of Chicago as before the passage of this ordinance, and any deed or contract given by virtue hereof shall in such event become immediately null and void.

Section 4. If the authorities of the said City of Chicago shall at any time hereafter establish a dock line on the West bank of the North Branch

of the Chicago River which shall necessitate the taking or cutting away any portions of such Streets and Alleys without charge or cost to said City, and shall thereupon cease to use, and shall surrender to said City such portion or portions of such Streets and Alleys without charge or cost to said City, and said Railroad Company shall not be entitled to receive damages for the portion of Streets or Alleys so taken or cut away. Any neglect on the part of said Railroad Company to comply with the provisions of this section shall forfeit all right of said Company to occupy or longer use the Streets and Alleys herein vacated."

The purchasers request a release from the City of Chicago to the North Western Railroad Company of all interest that the City may have acquired in the vacated streets and alleys under and by virtue of said ordinance of vacation of 1861.

We have given the matter careful consideration after reviewing a brief submitted by Wilson & McIlvaine covering decisions and laws on the subject matter and our own study of decisions, statutes and former opinions rendered by our office, which laws and some decisions are summarized briefly as follows:

Opinion No. 9899 of October 20, 1938 of the Corporation Counsel of Chicago, stated:

In the case of *People v. City of Chicago*, 154 Ill. App. 578, the city council on October 29, 1896, passed an ordinance providing for the vacation of certain streets and alleys. The ordinance also provided that if any part of the streets or alleys so vacated shall at anytime hereafter be used for any other than religious or educational purposes, then, and in such case, the ordinance would be void. The court on page 583 said the following:

"We think that the ordinance was operative as a vacation of the portions of the street and alley which by its terms were vacated, and that the proviso that in a certain contingency the ordinance should be void and the attempted reservation of a right in the city to maintain a sewer and water pipes in the vacated portions of said street and alleys were unauthorized by law and invalid. *Cooper v. Detroit*, 42 Mich. 584; *Wirt v. McEnery*, 21 Fed. 233; *Cheshire Turnpike v. Stevens*, 10 N. H. 133."

Opinion No. 9953 of February 2, 1939, substantially confirmed the above cited opinion and further stated:

"It is a well established principle of law that the only question to be considered by the city council in connection with the vacation of public streets and alleys is whether or not they are any longer necessary for public use and convenience (*Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, 1898). A public street or alley may not be vacated solely for the benefit of private interests (*People v. Benson*, 294 Ill. 236, 1920)."

"Once the necessary determination that the public interest will be advanced by the vacation of a street or alley has been made, it is apparent that the use of which the land will be put after vacation is not a matter of concern to the city council. It is our opinion that no valid provision can be framed which will make the vacation of a public street or alley contingent upon the use to which the land which formed the street or alley is put after the vacation."

From the foregoing, it appears that municipalities, particularly in the State of Illinois, with which we are now concerned, never had the power to make reservations of any kind in vacation ordinances until July 25, 1945, when the statute affecting vacations was amended by the State Legislature granting the municipalities power to reserve rights and easements as in the judgment of the corporate authorities may be desirable for continuing public service for any facilities.

It is therefore apparent that the ordinance of 1861 which attempted to make provisions and reservations with a Reverter Clause in it was invalid as to the reservations, conditions and reverter clause only, and that the City of Chicago did not at that time have nor has it at this time any right, title or interest in the streets and alleys so vacated by said ordinance of 1861.

We therefore accordingly have prepared a quit claim deed to be executed by the City of Chicago to the North Western Railroad Company, wherein the City conveys and releases all its interest, if any, that it may have acquired in the vacated streets and alleys described in said ordinance of 1861, together with an ordinance authorizing its execution, which we forward with our approval indicated thereon, for further processing.

MEDICAL CENTER PROPERTY

(Commissioner, Department of Urban Renewal—J. C. M.—June 14, 1962)

In answer to your inquiry with respect to the eligibility of the acquisition costs of the Medical Center Commission for real property acquired by it through purchase or condemnation, and resold to hospitals within the Medical Center District to be considered as local grants-in-aid, in connection with any Urban Renewal project or projects under the 1961 amendment to Section 112 of the Housing Act of 1949, we state as follows:

The amendment to Section 112 is by the Act of June 30, 1961, Public Law 87-70, Title III, Section 309, 75 Stat. 169. The Section-By-Section Summary of such Act, published by the United States Government Printing Office, summarizes the amendment as follows:

“Urban Renewal Areas Involving Colleges, Universities, or Hospitals. Section 309.—Rewritten Section 112 of such Act to allow—

(1) credit as a local grant-in-aid for State-licensed hospital expenditures in urban renewal areas.

(2) expenditures made by university or hospital acting through city or public corporation to be eligible as local grant-in-aid.

(3) similar expenditures made by State agency leasing properties to university or hospital to be eligible as local grant-in-aid.

(4) expenditures by institution or hospital in acquisition of property from city when not acting as urban renewal agency to be eligible as local grant-in-aid.

(5) expenditures by institution or hospital in relocating occupants being displaced from structures to be rehabilitated to be eligible as local grant-in-aid.

(6) expenditures to count if made not over 7 years prior to authorization by Housing Administrator of a loan or grant contract for the project, or if made in connection with a project for which a loan or grant contract was authorized prior to September 25, 1963, if expenditures were made not over 5 years prior to submission of application for financial assistance.”

The records of the Subcommittee on Housing, of the committee on banking and currency of both the House of Representatives and Senate, make clear the purpose of the changes made by the 1961 Act, to Section 112. Evidence was introduced before such Subcommittee to the effect that by general statute in the State of Pennsylvania, there is an educational authority which purchases real property on behalf of educational institutions. In order to cover such case and others of like nature, the Act was amended to read:

"The aggregate expenditures made by any such institution or hospital (directly or through a private redevelopment corporation or municipal or other public corporation) for the acquisition within, adjacent to, or in the immediate vicinity of the project area, of land, buildings, and structures to be redeveloped or rehabilitated by such institution for educational uses or by such hospital for hospital uses in accordance with the urban renewal plan (or with a development plan proposed by such institution, hospital, or corporation, found acceptable by the Administrator after considering the standards specified in Section 110 (b) and approved under State or local law after public hearing) and for the demolition of such buildings and structures if, pursuant to such urban renewal or development plan, the land is to be cleared and redeveloped, and for the relocation of occupants from buildings and structures to be demolished or rehabilitated, as certified by such institution or hospital to the local public agency and approved by the Administrator, shall be a local grant-in-aid in connection with such urban renewal project: . . ."

Section 112 (c) and (d) amended in 1961 read as follows:

"(c) The aggregate expenditures made by any public authority, established by any State, for acquisition, demolition, and relocation in connection with land, buildings, and structures acquired by such public authority and leased to an educational institution for educational uses or to a hospital for hospital uses shall be deemed a local grant-in-aid to the same extent as if such expenditures had been made directly by such educational institution or hospital.

"(d) As used in this section—

'(1) the term "educational institution" means any educational institution of higher learning, including any public educational institution or any private educational institution, no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

'(2) the term "hospital" means any hospital licensed by the State in which such hospital is located, including any public hospital or any nonprofit hospital, no part of the net earnings of which inures to the benefit of any private shareholder or individual.'

The Urban Renewal Manual of the Housing And Home Finance Agency, provides in Chapter 17-4-1, entitled "Non- cash Local Grants-in-aid", as follows:

"The following may be eligible as non-cash local grants-in-aid: . . . (5) Under the provisions of Section 112 of Title I, certain expenditures by a college or university (See Section 17-4-3)."

Section 17-4-3 provides, in part, as follows:

"Expenditures of Educational Institutions Under Section 112"

"Expenditures for land acquisition, demolition, and relocation, offered as non-cash local grants-in-aid under Section 112 of Title I, must be made by an educational institution directly or through an eligible private redevelopment corporation."

Section 17-4-3 also provides:

"Expenditures may include only the direct cost of the real property. Cost of recording the deed of conveyance, and any other overhead or administrative or indirect cost in connection with the land acquisition, will not be allowed. 'Cost of the real property' may be the full amount of the purchase price, less any part of the purchase price which had been paid in advance of the 'five-year prior' period."

Local Public Agency Letter No. 214, dated July 1, 1961, of the Housing and Home Finance Agency, on the subject "Policies to Govern the Provisions

of Section 112 of Title I, Urban Renewal Areas Involving Colleges, Universities or Hospitals, says that the amendments to Section 112 contained in the Housing Act of 1961, are as follows:

"Allows for non-cash local grant-in-aid credit certain expenditures made by a municipal or other public corporation acting in behalf of the educational institution or hospital.

Allow for non-cash local grant-in-aid credit certain expenditures made by a State public agency in connection with property leased by it to the educational institution or hospital."

A statement of the basic policies to govern the administration of Section 112 as amended, attached to such letter, provides, in part (p. 2), as follows:

"Eligibility of Expenditures Offered As Non-Cash Local Grants-In-Aid

1. Eligible Donors

To be eligible as a non-cash local grants-in-aid, expenditures for land acquisition, demolition, and relocation must have been made by:

- a. The educational institution or hospital directly.
- b. A private development corporation or a municipal or other public corporation, acting in behalf of the educational institution or hospital.
- c. A public authority, established by a State, which leases the land and any remaining structures to an educational institution for educational uses or to a hospital for hospital uses."

In our opinion, the provisions of Section 112 of the Housing Act of 1949 as amended in 1961, of LPA letter No. 214, and of the statement attached to the letter, support the theory that the Medical Center Commission is an eligible redevelopment corporation, with respect to eligibility of expenditures made by it for acquisition of real property for hospitals within the Medical Center District. Such expenditures for acquisition of the real properties acquired and sold to the several hospitals are, in our opinion, "expenditures made by any such . . . hospital . . . through . . . municipal or other public corporation for the acquisition . . ." as provided in Section 112.

Section 1 of the Medical Center District Act (Ill. Rev. Stat. 1941—Ch. 91, Section 125) created in the City of Chicago, a Medical Center District.

Section 2 of the Act (Section 126) creates "A body politic and corporate under the corporate name of Medical Center Commission," with the powers, among others, to contract and to be contracted with, and to sue and to be sued.

By Section 3 (127) of the Act, it is provided as follows:

"The Commission is authorized to acquire the fee simple title to real property lying within the District and personal property required for its purposes, by gift, purchase, or otherwise, and title thereto shall be taken in the corporate name of the Commission. The Commission may acquire by lease such real and personal property found by the Commission to be necessary for its purposes and to which the Commission finds that it need not acquire the fee simple title for carrying out of such purposes. All real property within the District, except that owned and used for purposes authorized under this Act by medical institutions or allied educational institutions, hospitals, dispensaries, clinics, dormitories or homes for the nurses, doctors, students, instructors or other officers or employees of the aforesaid institutions located in the District, or any real property which is used for offices or for recreational purposes in connection with the aforesaid institutions may be acquired by the Commission in its corporate name under the provisions of 'An Act to

provide for the exercise of the right of Eminent Domain', approved April 10, 1872, as amended;'

Section 6 of the Act (Section 130) provides, in part, as follows:

"The Commission may at such times as it deems advisable for the development of the District, lease any parcel of real estate acquired by it or sell the fee simple title thereto or any lesser estate therein to any medical or allied educational institution, hospital, dispensary, clinic, religious organization, corporation, trust, individual, or group of individuals, to be used, subject to the restrictions of this Act, for the purposes stated in Section 4, and to any corporation or person who shall use the same for serving persons using the facilities offered within the District, subject to such restrictions as to the use thereof as the Commission shall determine will carry out the purpose of this Act. To assure that the use of the real property so sold or leased is in accordance with the provisions of this Act, the Commission shall inquire into and satisfy itself concerning the financial ability of the purchaser to complete the project for which said real estate is sold or leased in accordance with a plan to be presented by the purchaser or lessee, which plan shall be submitted, in writing, to the Commission. Such purchaser or lessee shall under such plan undertake (1) to use the land for the purposes designated in the plan so presented; (2) to commence and complete the construction of the buildings or other structures to be included in the project within such periods of time as the Commission fixes as reasonable; and (3) to comply with such other conditions as the Commission shall determine are necessary to carry out the project. Any real property sold by the Commission pursuant to the provisions of this Act shall be sold at its use value, which may be more or less than its acquisition cost, and which use value represents the value at which the Commission determines, after a hearing by the Commission or by such person as the Commission designates to hold such hearing, such real property should be made available for sale or rental in order that it may be developed for the accomplishment of the purposes of this Act. In determining the use value of the real property, the Commission shall take into consideration whether or not said property is to be used by a wholly or partially tax supported body created under the laws of the State of Illinois, by any department of the State government or any political subdivision of the State, by a charitable institution, or by a private person or institution operating for profit; and the Commission shall also consider the contribution that the project will make toward the development of the District and the furtherance of the purposes of this Act in determining such use price, provided, however, that the Commission may convey the fee simple title to land acquired by it, without the payment of any consideration, to the State of Illinois, any political subdivision thereof or to any body politic and corporate or public corporation created under the laws of the State of Illinois for the carrying out of any function of the State. At any hearing for the purpose of the Commission's making the aforesaid determinations, an investigation should be made and such witnesses and documentary evidence examined as will have bearing on the use value of the property to be sold or leased as is herein provided. The Commission shall designate a Commissioner or other person of legal age to conduct the hearing provided for herein, and such Commissioner or other person so designated by the Commission shall give reasonable notice to the interested parties of the time, place and purpose for the holding of such hearing. Such Commissioner or other person designated by the Commission to hold such hearing shall have the power to administer oaths and affirmations, and shall cause to be taken the testimony of witnesses and the production of papers, books, records, accounts and documents; and the person so designated to hold such hearing shall certify to the Commission the record of the proceedings held before him in connection with such hearing. Such record of proceedings shall become a part of the records of the Commission. All such conveyances and leases of real estate made by the Commission to any medical or allied educational institution, hospital, dispensary, clinic, religious organization, or otherwise as authorized in this section shall be on condition that, in the event of non-use for the purposes prescribed in this Act, or of disuse for a period of one year, title to such property shall revert to the Com-

mission, unless an extension is granted by the Commission after public hearings. All conveyances and leases made by the Commission to any corporation or person for use of serving the residents or any person using the facilities offered within the District shall be on condition that in the event of violation of any of the restrictions as to the use thereof as the Commission shall have determined will carry out the purposes of this Act, that title to such property shall revert to the Commission upon a finding by the Commission, after public hearing, of violation of such restrictions, unless the Commission finds that financing necessary for the construction of any building or improvement to be used by any corporation or person for use of serving the residents or any person using the facilities offered within the District cannot be obtained if title to the land upon which such building or improvement is to be made is subject to such reverter provision, which finding shall be made by the Commission after public hearing held pursuant to a single publication notice given in a secular newspaper of general circulation in the City of Chicago at least ten days prior to the date of such hearing, such notice to specify the time, place and purpose for such hearing, and upon such finding being made, the Commission may cause such real property to be conveyed free of such reverter provision, provided that at least five members of the Commission vote in favor thereof. The hearing in this section provided for shall be conducted by any Commissioner or any other person authorized by the Commission, and the person conducting such hearing shall have the power to administer oaths and affirmations, and shall hear such oral evidence and receive such documentary evidence as shall be pertinent, and he shall certify the record of the hearing to the Commission."

The General Assembly has the power to create administrative agencies and may delegate its powers to an administrative agency as long as it does not invest such agency with arbitrary powers or delegate its general legislative authority, and it may delegate the power to select and condemn real estate for public purposes. *Department of Public Works and Buildings v. Chicago Title & Trust Company*, 408 Ill. 41, 46 (1951). The State's constitutional power to expend public money and to exercise the right of eminent domain may be entrusted by the legislature to instruments of its own choosing. *Crommett v. City of Portland, Me.*, 107 Atl. 2d 840 (1954). The legislature may delegate the power of eminent domain to a Commission. *C. B. & Q. R. R. Co. v. Cavanagh*, 278 Ill. 609 (1917); *People ex rel. Gutnecht v. City of Chicago*, 414 Ill. 600, 616, 111 N. E. 2d 626 (1953).

It is uniformly held that slum clearance and the construction of low-rent housing projects are for public and governmental purposes, and that state legislatures may properly grant the right of eminent domain to housing authorities without constitutional violation. *Housing Authority v. Higginbotham*, 135 Tex. 158, 143 S. W. 2d 79, 130 A. L. R. 1053, annotation 130 A. L. R. 1077 note (1940).

It has been recognized that slum clearance and low-cost housing are Federal public uses; that by reducing illness, disease, and crime, aiding the morals, increasing employment, and stimulating industry, in a particular community, slum clearance and low-cost housing have a beneficial effect upon the nation as a whole. *Oklahoma City v. Sanders* (C. C. A. 10th Cir.), 94 Fed. 2d 323, 327, 115 A. L. R. 363 (1938).

The prevention of slums and blighted areas is a public use and a public purpose for which the right of eminent domain may be exercised. *People ex rel. Gutnecht v. City of Chicago*, 3 Ill. 2d 539, 121 N. E. 2d 791 (1954).

The purpose of the Housing Authorities Act is the promotion of the health, safety, morals and welfare of the public, and housing authorities are municipal corporations and constitute bodies corporate and politic, exercising public and essential governmental functions, and have all the powers, including the power of purchasing and selling real estate, necessary and convenient to carry out and effectuate the purposes and provisions of the act and to engage in low-rent housing and slum clearance projects. *Housing Authority of Gallatin County v. Church of God*, 401 Ill. 100, 107, 81 N. W. 2d 500

(1948). Under a housing authority law a city is authorized to expend public funds for clearance of slums and low rental houses which are public uses. *Allydonn Realty Corp. v. Holyoke Housing Authority*, 304 Mass. 288, 23 N. E. 2d 665, 668 (1939).

The removal of health, crime and fire hazards by slum clearance is a proper exercise of the police power, and such removal is effected by slum clearance simpliciter, and the fact that under subsequent rehabilitation or restoration the cleared area under the process passes into private hands and becomes private property does not change the nature of slum clearance as a public improvement in the public interest. *Nashville Housing Authority v. City of Nashville*, 192 Tenn. 103, 237 S. W. 2d 946, 948, 949 (1951). The fact that a redevelopment act contemplates that after an area is taken by eminent domain for redevelopment purposes, some, or even all, of the land may be sold or leased to private individuals, referred to as redevelopers, does not result in depriving a person of his property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution, since private property taken for the purpose of eradicating such conditions is taken for a "public use." *Chold Realty Co. v. City of Hartford*, 141 Conn. 135, 104 Atl. 2d 365 (1954); *Randolph v. Wilmington Housing Authority*, Del., 139 Atl. 2d 476 (1958); *Housing and Redevelopment Authority v. Greenman*, 255 Minn. 396, 96 N. W. 2d 673 (1959); *Velishka v. Nashua*, 99 N. W. 161, 106 Atl. 2d 571, 44 A. L. R. 2d 1406 (1954).

The reasoning by which the expenditure of public funds, the lending of credit, and the exercise of the power of eminent domain, as provided by redevelopment laws, are held valid despite the provision for the transfer of lands thus acquired by a public authority to private parties is, generally, that by the acquisition and clearing of slum or blighted areas, the public use or purpose is thereby completely served, and the transfer of such lands to private parties afterward is merely incidental to the main public purpose, Annotation: 44 A. L. R. 2d 1419, 1420 et seq.

The law in Illinois is in accord with this rule. Thus, acquisition of property by the Chicago Land Clearance Commission in a slum and blighted area for the purpose of clearing moral and physical blight which slum and congestion created, although the commission entered into a contract for the sale to a private corporation, an insurance company, of a portion of the property where buildings had been removed, did not constitute a taking for private purposes, as a proceeding for redevelopment of a slum and blighted area is for a public purpose regardless of the use to be made of the property after the redevelopment has been achieved. And where the controlling motive for the condemnation of private property was to clear from the area in question moral and physical blight which slum and congestion created, the subsequent development of the property by the insurance company did not mean that the taking was for a private purpose. *Chicago Land Clearance Commission v. White*, 411 Ill. 310, 316, 104 N. E. 2d 236 (1952); *Chicago Land Clearance Commission v. White*, 1 Ill. 2d 69, 115 N. E. 2d 337 (1953); *Chicago Land Clearance Commission v. White*, 2 Ill. 2d 216, 117 N. E. 2d 764 (1954); *Robinette v. Chicago Land Clearance Commission*, D. C. Ill. 115 Fed. Supp. 669 (1953). Section 81 of the Blighted Areas Redevelopment Act of 1947 (Ill. Rev. Stat. Ch. 67½, sec. 81) authorizing land clearance commissions to sell land at use value is not invalid under Illinois Constitution Separate Section 2, as authorizing commissions to give financial assistance, make donations, or loan their credit to private corporations. *People ex rel. Gutknecht v. City of Chicago*, 414 Ill. 600, 111 N. E. 2d 626 (1953). In view of the fact that the Blighted Areas Redevelopment Act of 1947 requires assurance of development in accordance with a development plan by a purchaser of condemned realty, elimination of blighted vacant areas as defined in the act is itself a public purpose regardless of the type of redevelopment thereafter. *People ex rel. Adamowski v. Chicago Land Clearance Commission*, 14 Ill. 2d 74, 150 N. E. 2d 792 (1958); *Waddell v. Chicago Land Clearance Commission*, 206 Fed. 2d 748, 750 (1953). Likewise, when slum and blight areas have been reclaimed under the Neighborhood Redevelopment Corporation Law, the public purpose of taking property for the elimination of such areas has been fully accom-

plished, and the fact that the statute does not assure the continued use thereafter of the property acquired for public purposes does not render the taking one for a use or purpose which is not public. *Zurn v. City of Chicago*, 389 Ill. 114, 59 N. E. 2d 18 (1945).

The same rule applies to sales to hospitals. In *Jurus v. Chicago Housing Authority*, 1 Ill. App. 2d 297, 117 N. E. 2d 420 (1954, Abst.), the Appellate Court in its opinion (Gen. No. 46, 107) held that the Chicago Housing Authority had the authority to bring proceedings to condemn property within an area designated as an "integrated project" for rehabilitation and redevelopment of a blighted or slum area to be resold to a private hospital, Michael Reese Hospital, for redevelopment, and the fact that the Authority had made an agreement for the sale of the property to the hospital did not mean that the property was being taken for a private use, or constitute the taking of property without due process of law. Also, the acquisition, clearance and rehabilitation of a substandard and unsanitary area in a city, entirely separate and distinct from the ultimate use of the realty for low-rent housing for persons of low income, was a "public use or purpose", for which the state constitution and the Public Housing Law authorized private property to be taken in condemnation proceedings, and such requirements of public use and purpose may be met through the acquisition and clearance of the area involved by the housing authority and provision for redevelopment by a hospital. *Klibanoff v. City of New York*, 24 Wisc. 2d 649, 206 N. Y. Supp. 2d 301, 304 (1960).

In *Miller v. Louisville, Ky.*, 321 S. W. 2d 237 (1959), the Court of Appeals of Kentucky upheld the validity of an ordinance authorizing five million dollars in bonds for the purpose of erecting a medical center, a civic center, and a program of urban renewal and urban redevelopment, holding that each of these objects served a public purpose.

In some instances, a legislature establishes commissions or authorities to exercise the governmental powers of slum clearance or urban redevelopment, in others, it passes enabling acts, under which a municipality is empowered to create an authority or other authorized agency to undertake the programs of slum clearance or urban redevelopment.

In our opinion, the Medical Center Commission is an eligible donor of Section 112 credits for costs of acquisition of parcels of real estate in the Medical Center District which it subsequently sold to hospitals, and costs of clearance of the same, if any, as eligible local non-cash grants-in-aid, pursuant to the provisions of Section 112 of the Federal Housing Act of 1949, as amended in 1961. We are of the further opinion that the expenditures eligible are the direct cost of the real property to the Medical Center Commission whether acquired by purchase or condemnation proceedings, and not the prices actually paid by the hospitals in consideration for deeds of conveyance of such parcels as were sold to them by the Commission, and that the cost of recording the deed of conveyance, and any other overhead or administrative or indirect cost in connection with the land acquisition, will not be allowable as Section 112 credits. "Cost of the real property" may be the full amount of the purchase price (including the amount of any mortgage given or assumed by the purchaser or to which the property was subject when title was taken), less any part of the purchase price which had been paid in advance of the applicable "7-year prior" or "5-year prior" period, as a good faith deposit or otherwise.

The word "expenditure" has been defined as the spending of money; the act of expending; disbursement expense; money expended; a laying out of money; payment. *Crow v. Board of Supervisors of Stanislaus County*, 135 Cal. App. 451, 27 Pac. 2d 655; *In re Toler's Estate*, 49 Cal. 2d 460, 319 Pac. 2d 337, 340; *Municipal Housing Authority v. Levine*, 136 N. Y. Supp. 2d 197, 198. "By" means through the means, act, or instrumentality of. *U. S. Fidelity & Guaranty Co. v. Industrial Commission of Colorado*, 96 Colo. 571, 45 Pac. 2d 895, 899. "Through" means by means of, by the agency of, by reason of, in consequence of, and because of. *Great Atlantic & Pacific Tea Co. v. City of Richmond*, 183 Va. 931, 33 S. E. 2d 795.

The hospitals acted "by" or "through" the agency or instrumentality of the Medical Center Commission, which in a real sense acted as "agent" for the several hospitals in assembling the parcels in the district area, in acquiring by purchase or condemnation the several parcels, as it was authorized by statute to do. Such "agency" is predicated upon the impracticability of the individual hospitals acquiring and clearing such parcels in the absence of their having the power of eminent domain. The legislature deemed it necessary and in the public interest that a municipal corporation, a body politic and corporate be created as a necessary expedient not only to eliminate a slum and blighted area but also to satisfy another public need of fostering adequate hospital and allied facilities and assembling or centering them in one district, both of which aims constitute an exercise of the police power and the power of eminent domain by the State in furtherance of the protection of the public health, safety, morals and public welfare.

In our opinion, the provisions of the Urban Renewal Consolidation Act of 1961 (Ill. Rev. Stat. Ch. 67½, Sections 91.101-91.136) support our position that the Medical Center Commission is an eligible donor of Section 112 credits. Authority to apply for and accept advances, loans, grants, contributions, gifts, services, or other financial assistance, from the United States or any agency or instrumentality thereof, or from any "municipality or other public body" (which in our opinion includes grants-in-aid in the nature of eligible expenditures made by the Medical Center Commission pursuant to Section 112, it being a "municipal corporation" and a "body corporate and politic" by statutory definition), is conferred on the City of Chicago by Section 24(e) of the Act of 1961 (Ill. Rev. Stat. Ch. 67½, Section 91.124(c)). Also, authority is given the City of Chicago to enter into cooperation and conveyance agreements with any hospital or educational institution of higher learning, or any private corporation acting on behalf of such institutions, respecting the redevelopment or renewal or conservation of slum or blighted or conservation areas, embracing, adjacent to, or in the immediate vicinity of such hospital, educational institution or a major branch thereof, to perform such agreements and do and perform any or all actions or things necessary or desirable to assure that it obtains credit as a local grant-in-aid for the aggregate amount of expenditures made by any such hospital, educational institution, or private corporation acting on behalf of such institutions, which would be eligible as such under Title I of the Federal Housing Act of 1949, as amended, pursuant to the provisions of Section 24(1) of the Act of 1961 (Ill. Rev. Stat. Ch. 67½, Section 91.124(1)). Section 25(a) and (b) confers authority and power both on the public corporation acting on behalf of such institutions (in this case, The Medical Center Commission) to donate such credits for such aggregate expenditures to the City of Chicago, acting through its Department of Urban Renewal, and Section 25(c) confers authority on the City to accept and effectually utilize such credits.

Our construction of Sections 24(c) and 25(a), (b) and (c) of the Act of 1961 is verified by the provisions of Section 91.13a of Chapter 67½, Ill. Rev. Stat. 1961, entitled "Federal loans and grants", from which the language of these two sections is derived in part, in that after authorizing a city to seek financial assistance from the United States, the Housing and Home Finance Agency, or any other agency or instrumentality thereof, the State, County, Municipality, or *other public body*, etc. it authorizes the municipality to issue evidences of indebtedness to any such parties, provided that such evidences of indebtedness shall be payable solely from enumerated sources, including "out of such capital grants as the Municipality may receive from the United States of America, or any agency or instrumentality thereof, or out of *any local grants-in-aid* as defined in Section 110 of the Act of Congress approved July 15, 1949, being Public Law 171-81st Congress, known as the 'Housing Act of 1949' as amended (42 U. S. C. A. section 1460), *which the Municipality or any other municipal corporation, commission, district, authority or other subdivision or public body of the State or any other entity may make in connection with the implementation of a conservation plan for a conservation area as defined herein . . .*" (Emphasis supplied.)

In our opinion, therefore, the Department of Urban Renewal has the authority to claim credit as local grants-in-aid for the aggregate expenditures made by the Medical Center Commission for real property acquired by it through purchase or condemnation and resold to hospitals within the Medical Center District, in connection with any urban renewal project or projects pursuant to Section 112 of the Housing Act of 1949, as amended in 1961.

LEASE OF TERMINAL FACILITIES

(Commissioner of Aviation—C. F. V.—July 17, 1962)

Your letter of June 6 requests our advice regarding proper measurement of space in the new terminal facilities at O'Hare in order to determine rentals. You seek our opinion pursuant to sending current airline leases to reflect the correct locations, area of space and rentals thereof.

It is our understanding that the Airline Top Committee urges that square footage of space determining rental be measured from the inside face of office walls with area deductions therefrom for permanent vertical ducts and stairwells. Your department, on the other hand, contends that space should be measured from the centerline of peripheral structural supporting columns without any deductions.

In Section 2.01 of the Lease of Terminal Facilities the City agrees to lease specified areas in the new terminal to each airline. Space, measured in square feet, is demised for each of six separate areas of use determined by the purpose to which the space will be used by the airlines. Said lease does not, however, indicate the method of measuring square footage. It indicates only that "City leases to Airline and grants * * * the exclusive use of the following premises (including improvements and facilities therein) * * *

a) an aggregate of square feet, etc."

Section 4.01 establishes rental for all space demised. The rental is based, not on an amount per square foot but rather, on the area in gross.

Exhibits attached to the original Lease of Terminal facilities, though not drawn in detail, show no deduction for ducts and stairwells although total square footage is indicated.

We are informed that each airline was consulted, albeit informally, during and after the time that plans were drawn and prior to construction; no objection as to measurement of space according to the design was then made. Lessees entered possession and are paying rent. It is only now when specific locations and areas are designated—as provided under section 2.08 of the agreement—that the objection is raised.

It is our opinion that the measurement of space as adopted by your department is a proper interpretation of the contract documents. The purpose of any venture at interpretation of a contract is to discover the true intention of the parties regarding an unexpressed or unclear term.

The Airline Top Committee supports its contention by citing the pamphlet entitled "Standard Method of Floor Measurement" as published by the National Association of Building Owners and Managers. Alleged trade customs and practice may support a particular interpretation only if the basic intention of the parties is thereby subserved. Our investigation has shown neither general recognition of the cited publication, nor, indeed, a general established trade practice regarding spatial measurement.

However, the conduct of the parties is evidence of intention for interpretation of contract terms, and, we believe, the same is persuasive in this

dispute. The airlines executed leases, exhibits attached to which show no space deductions; lessees failed to object to design prior to construction; they entered possession and are paying rent. This conduct indicates their assent to the method of spatial measurement employed by the designers.

These leases were entered prior to design and construction of the premises. One purpose of designating in said leases an aggregate number of square footage was to serve as a guide in design and construction of the premises based on each airline's needs as specified in the lease. Your letter indicates that the architects designed the buildings using the center line of outside supporting columns as the perimeter of the "aggregate" number of square feet specified in the lease.

Thus, rental, being expressly predicated on the area in gross, is paid not according to inside space effectively occupied and measured by lessee, but rather according to the initial design of the structure. This appears to be the original intention of the agreement.

Leased area may be measured in any manner which the parties agree. The apparent original intention of the document regarding method of measurement is fixed by the interpretation placed on the contract by the conduct of the parties subsequent to execution.

We observe that the "Area Assignments" drawing transmitted with your letter measure square footage, generally from the centerline of exterior and interior walls. Although, in most instances, such centerline is also the centerline of outside supporting columns, this method does throughout conform to construction design. We suggest, therefore, that the lease amendments now being prepared express the method of spatial measurement in terms verbatim with the "Area Assignments" drawings. Pertinent drawings should be attached to each amending instrument and language should be included which will foreclose the problem from further argument.

IMPROVEMENTS OF CHICAGO PORT

(Port Director—W. M. Z.—January 16, 1963)

Please refer to your communication to this office which in part reads as follows:

"The Port Director considers that the acquisition of heavy lift cranes is of vital importance to maintain the eminence of the Seaport of Chicago as the number one Seaport of the Great Lakes—and without modern equipment for handling general cargo we will be at a distinct disadvantage."

"In the word 'improvement' used in submitting the General Obligation Bond issues: Improvements to Navy Pier, the Port Director assumes that improvements to Navy Pier definitely should include cranes or heavy lift equipment. However, as the word 'improvements' might be misconstrued by me, the Department of the Port of Chicago desires to make inquiry—previous to making application to the Purchasing Agent—of the various builders of such cranes to submit brochures and pertinent data. However, the Port Director respectfully requests the Corporation Counsel for an opinion as to my interpretation of the word 'improvements'."

We find from an examination of Webster's New Collegiate Dictionary that the word "Improvement" means an addition or modification that improves land, a machine, etc.

May we further call to your attention our opinion which appears in "Opinions of the Corporation Counsel," Volume 22 at page 530 which among other phrases states as follows:

"The word 'improve' has been defined as meaning, to make better; to increase the value or good qualities of anything; to use or to employ to a good purpose; to make productive or to turn to profitable account; to use to advantage (Words and Phrases, Permanent Edition)."

It is therefore our opinion that the acquisition of heavy lift cranes is an improvement and refers to the word "improvement" used in submitting the General Obligation Bond issues.

EFFECT OF UNTENANTABILITY

(*President, Emery Air Freight Corporation—R. L. H.—July 21, 1964*)

Your recent letter directed to the Corporation Counsel has been given to the undersigned for reply.

Your letter refers specifically to Commissioner Downes' letter of August 23, 1963 wherein he states that the rental would not commence until the completion of your building and to Article VIII of the lease agreement and implies that our interpretation of the lease agreement is in contradiction thereto.

Article VIII of the Lease Agreement provides for the abatement of rent. This Article provides for abatement of the full rent in the event of either full untenantability of the demised premises or the closing of the airport, and provides for partial abatement of rent in the event of partial untenantability. This Article also provides that the determination of degree of untenantability be made solely by the Commissioner of Aviation.

Commissioner Downes' letter of August 23, 1963, does not refer to untenantability in any manner, but merely states that the rent will commence after completion of the building. Under Article VIII, the only authority given to the Commissioner to abate rent is in the event of untenantability, there being no question at this time that the airport is not closed.

"Untenantability" has been defined as:

". . . not fit to be rented or occupied", *Reischmann v. Hartog Candy Co.*, 132 N. Y. S. 435;

and another court has also stated:

"The premises are untenantable and unfit for occupancy within the meaning of such provisions if, and only if, the destruction is so complete that they cannot be used for the purposes for which they were leased." *Senter v. Dixie Motor Coach Corp.*, 67 S. W. 2d 345, aff'd, 97 S. W. 2d 945.

Although the demised premises in both of these cases was part of a building destroyed by fire, the general principles of law stated therein can be applied to the instant matter where the demised premises is a parcel of ground. The landlord in the *Senter* case, hereinabove quoted from, had the authority to exercise his sole discretion in deeming the premises untenantable, as the Commissioner has here. The Court held, however, that the

discretionary determination could not be arbitrary, but must be based upon good faith and investigation.

Since the premises leased here was a parcel of ground, and since your purpose as lessee in leasing said ground was to go upon said property, build a building and then use same in your business, the only legally sufficient basis for holding the said premises untenable would be if you were prohibited from entering upon the leased property for the purpose for which it was leased. Since your letter refers to the fact that the building is presently under construction, and has been for quite a few months, it is quite evident, that no such prohibition was imposed upon you.

It is therefore our opinion that since the condition of untenability does not now exist and has not existed at any time from July 1, 1963 to date, in the absence of amendment to the lease agreement there is no legally sufficient basis which will support an abatement of rental.

Our original interpretation must therefore stand in its entirety.

In the event you would like your attorneys to discuss this with us, our office would be agreeable thereto at their convenience.

TITLE THROUGH ADVERSE POSSESSION

(Librarian, Chicago Public Library—W. R. M.—March 22, 1965)

We have your letter requesting an opinion with reference to branch library building housing the George C. Walker Branch located at 11071 South Hoyne Avenue, in which you indicate that the east wall thereof encroaches two inches on the abutting property, also that eave of said building also encroaches ten inches and that these encroachments have existed for 35 years. You also state that a construction company, now in the process of erecting an apartment building on said abutting property, the plans for which call for a wall to be erected flush against the east wall of the library which was erected in 1929, now complains of said encroachments as interfering with its construction work, and requesting the Chicago Public Library to act. We will consider your first question; to-wit:

1. "Does the fact that our building has stood as it is over thirty-five years nullify the fact that it extends over the property line?"

We have examined the law and it is our opinion that the encroachment having existed 35 years without objections, that the abutting property owner is now precluded from any recourse against the City of Chicago as owner of the property by virtue of the Statute of Limitations and that the City of Chicago now has title by adverse possession to the property encroached upon (Section 1, Chapter 83, 1963 Illinois Revised Statutes).

In line with our above opinion, answers to questions 2 and 3 are needless.

GAS LIGHTED STANDARDS IN PARKWAYS

(Commissioner of Streets and Sanitation—R. N.—December 17, 1965)

Under date of December 13, 1965 you requested our opinion on a matter of gas lighted standards in city parkways. You call our attention to the fact that this opinion was formerly requested by you by letter of October 4, 1965. Our records do not indicate receipt of a former request by you—however, we regret the delay from whatever cause—and submit the following:

- 1—Your first inquiry is as to your authority to grant permission, under section 14-3 of the Code, for the erection of gas lighted standards in city parkways. Section 14-3 charges the commissioner of streets and sanitation with supervision of the lighting of the public ways. No reference is made to the source of illumination. In our opinion this leaves the determination of the decision in your discretion. Our investigation indicates that in a few areas in the city ornamental lighting other than the standard lighting used throughout the city has been installed by abutting property owners at their expense. In some areas this ornamental lighting is powered by electricity, in others by gas. Permits for both types have formerly been issued by the department of streets and sanitation, and indemnity bonds in the amount of \$10,000 covering such installations have been filed with the city as required by the commissioner of streets and sanitation in his discretion. This brings us to your second question.
- 2—Would a \$10,000 surety bond suffice to indemnify the city against all liabilities? The situation most likely to create a liability would arise from collision with the standard and the possible consequential damage stemming from the illuminating agent. We have been informed that the Peoples Gas Company will furnish a statement that the gas standards are so constructed that in case of damage to the standard from any cause, an automatic shutoff will immediately seal off the supply of gas. The amount of the indemnification required would be a matter to be determined by the city council in consideration of the nature of the privilege granted—it might be noted that \$10,000 is the amount set for the indemnifying bond required in the case of a driveway over public property, as provided in section 33-17 of the Code.

The above, then, answers your specific inquiries—however we think it would be advisable to specifically provide by ordinance for gas operated installations inasmuch as supervision over commercial standards (Code: 86-80 thru 86-90) relates only to electric lamp posts, and these sections are a part of Chapter 86 which relates to enforcement of electrical regulations. Accordingly, we have prepared draft of an amendment to Chapter 33 which relates to work on and under public ways, including provision for approval of plans, issuance of permits, and furnishing of indemnity bond to your department. Said draft is transmitted herewith for your consideration and comment.

EASEMENT FOR SOUTHWEST HIGHWAY

(Bureau of Public Roads—March 28, 1966)

At the suggestion of Mr. Fletcher Krause, of the General Counsel's office of the Bureau of Public Roads, we are submitting herewith certain information relative to the above acquisition. An attempt has been made herein to answer the questions raised by Mr. Krause at the meeting held in Chicago March 15, 1966 attended by all interested parties.

I. *The Property To Be Acquired.*

The property in question was acquired for the Southwest Route of the Comprehensive Superhighway System of the City of Chicago (hereinafter referred to as "Southwest Expressway") pursuant to ordinance of the City of Chicago of July 11, 1959 as amended. The Southwest Expressway is a part of the national system of interstate and defense highways authorized by Act of Congress dated August 27, 1958 (Title 23 USCA, Section 101 et seq.) which provides that the construction of such system of highways is in the interest of

national defense and that the United States Government shall reimburse the states for certain portions of the cost thereof.

In the design of the Southwest Expressway it was early determined that it was desirable, in the best interests of the public and in the national interest, to provide a connection thereto at its eastern extremity in Chicago with south Lake Shore Drive, which generally parallels Lake Michigan. It was deemed most desirable to make this connection in the vicinity of E. 25th Street. It was also early determined that to construct a safe and practical interchange in this area it would be necessary to acquire land occupied by the Chicago Park District as Burnham Park, part of which was leased by the Metropolitan Fair and Exposition Authority, a municipal corporation of Illinois, which constructed and operated McCormick Place, the huge exposition center at Lake and 23rd.

The land required involved two parcels known as 18-75A and 18-75B. 18-75A (segment D on the plat enclosed herewith and marked Exhibit "A") comprises 9.946 acres (483,248 sq. ft.) and is a part of what is known as Burnham Park (which extends from Roosevelt Road (12th Street) to 55th Street). It is occupied as such by the Chicago Park District, but has no improvements on it, as it was recently used as a "Nike Site", which use has now been abandoned.

Parcel 18-75B (segments A, B, C and E on "Exhibit A") comprise 7.076 acres. Part of this parcel is leased out to the Metropolitan Fair and Exposition Authority (hereinafter called Authority) under a 40 year lease dated March 31, 1956 and part of it is used by the Authority for parking under a permit agreement with the Park District dated August 12, 1958, all in connection with McCormick Place, located at South Shore Drive and E. 23rd Street.

The Authority is a municipal corporation of the State of Illinois (Ill. Rev. Stat. 1965 (Section 6001 et seq.) whose duty it is, by statute,

"To promote, operate and maintain fairs, expositions and conventions from time to time in the Metropolitan area and in connection therewith to arrange, finance and maintain industrial, cultural, educational, trade and scientific exhibits and to construct, equip and maintain auditoriums and exposition buildings for such purposes. The Authority is granted all rights and powers necessary to perform such duties." (Section 6004.)

The Authority is financed entirely through the sale of bonds to the public and it operates McCormick Place solely for the benefit of the public.

McCormick Place was constructed at a cost of \$34,000,000 and is operated by Authority. It is a building three blocks long, a block wide, equal to ten stories in height, containing 33,000,000 cubic feet and 310,000 sq. ft. of floor space. Its varied activities and uses are shown in the ad of The First National Bank of Chicago and in the recent Chicago Tribune Articles which are enclosed as "Exhibit B".

Segments A, B, C and E shown on Exhibit A were used primarily for parking space, and access road to McCormick Place. This parking space was essential for the economic operation of McCormick Place and its usefulness to the general public.

Temporary easements of a two-year duration (designated as T-1 and T-2 on Exhibit A) are also being taken. Since the taking of T-1 involves the elimination of approximately 323 parking spaces for the two years, this also affects the operation of McCormick Place. The area of T-1 is 4.163 acres. The area of T-2 is 1.56 acres.

II. *The Title of the Chicago Park District to the Property Sought To Be Acquired.*

The property sought to be acquired as Segments A, B, C, D, E, F, T-1 and T-2 has been dealt with on the basis that it is owned by the Chicago Park District. Attached hereto as Exhibit "C" is a memorandum prepared by the First Assistant General Attorney of the Park District, dated March 16, 1966, and addressed to Thomas A. Foran, Assistant Corporation Counsel, setting forth the nature of the title of the Chicago Park District to the lands in question.

III. *The Acquisition of the Required Lands.*

Having before it the above background, the City's problem was how to acquire from the Chicago Park District, for the least cost, the necessary lands.

One possibility was condemnation. Section 11-61-2 of the Cities and Villages Act (Ill. Rev. Stat. 1965 Chap. 24) provides as follows:

"The corporate authorities of each municipality may vacate, lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and public grounds; and for these purposes or uses to take real property or portions thereof belonging to the taking municipality or to counties, school districts, boards of education, sanitary districts or sanitary district trustees, forest preserve districts or forest preserve district commissioners, and park districts or park commissioners, even though the property is already devoted to a public use, when the taking will not materially impair or interfere with the use already existing and will not be detrimental to the public."

One big question in the desired acquisition was whether it could reasonably be shown that "the taking will not materially impair or interfere with the use already existing and will not be detrimental to the public." If the Chicago Park District or if the Authority (which had an interest in part of the property as lessee and permittee) were subjected to condemnation proceedings it was likely they would attempt to establish that the proposed takings would materially impair or interfere with existing public uses and would be detrimental to the public. It was also quite possible that the bondholders of the Authority would raise any points which the Authority or the Park District saw fit not to raise. Protracted legal proceedings on the question of the right to take could be expected, not to mention on the question of damages (to be discussed *infra*).

Of course, it would be possible to ask the Federal government to do the condemning and thereby eliminate this question of right to condemn. But federal condemnation would also probably result in protracted and costly proceedings on questions of valuation.

In condemnation proceedings it could be expected that both the Chicago Park District and the Authority would claim that their property was put to such a special use that the usual rule of "Market value" as determinative of valuation was not applicable. This in turn would open the door to a claim for compensation greatly in excess of that which Mr. Leyden estimated was just compensation.

Under the rulings of the courts in many jurisdictions if, as in the case of Parks and other special use situations, "market value" does not determine value for property taken resort may be had to the cost of substitute facilities, or replacement costs or even loss of income (insofar as Authority would be concerned).

In *United States v. Board of Education*, 253 F. 2d 760 (U. S. C. A. 4th Cir. 1958), involving the taking of school premises by the United States, the United States Court of Appeals stated the general rule at p. 763:

"Under the circumstances shown by the evidence *it was clearly proper for the jury to take into consideration the cost of acquiring property acquired by the government, even if that property did have market value*, since severance damage to the residue could not reasonably be measured in terms of market value. Ordinarily, of course, market value is the measure of compensation in condemnation cases; and the difference in market value of the residue before and after taking is ordinarily a fair measure of severance damages. As said in *United States v. Cors*, 337 U. S. 325, 332, 69 S. Ct. 1086, 1090, 93 L. Ed. 1392, however, we are not to make a fetish of market value 'since it may not be the best measure of value in some cases.' *Where the highest and best use of the property is for municipal or governmental purposes, as to which no market value properly exists*, some other method of arriving at just compensation must be adopted and the cost of providing property in substitution for the property taken may reasonably be the basis of the award." (Emphasis supplied.)

Town of Winchester v. Cox (26 A. 2d 592; 129 Conn. 106, 1942), applies the same rule to park property.

Some of the other decisions in Illinois and elsewhere which indicated that if condemnation were brought the market value rule would not be applicable and that acquisition by condemnation would be exceedingly costly are: *Peoples Gas, Light and Coke Co. v. Buckles*, 24 Ill. 2d 520, 532; *Housing Authority v. Kosydar*, 17 Ill. 2d 602, 606; *L. S. & M. S. Ry. et al. v. C. & W. I. R. R. et al.*, 100 Ill. 21; *State v. Waco Independent School Dist.*, 364 S. W. 2d 263, 268; *U. S. v. Board of Education*, 253 F. 2d 760, 671; *Sanitary District of Chicago v. Pittsburgh etc. Ry. Co.*, 216 Ill. 575; *Dupuis v. Chicago & N. W. Ry. Co.*, 115 Ill. 97, 99; *C. B. & Q. Railway Co. v. City of Chicago*, 149 Ill. 457, 461; *City of Chicago v. Farwell*, 286 Ill. 415, 419; *Diocese of Buffalo v. State*, 250 NYS 2d 961; *State v. Levy*, 136 S. 2d 34; *Albany Country Club v. State*, 241 NYS 2d 604.

See also Nichols on Eminent Domain 3rd Ed. Volume 4 Section 12.32 (p. 217 et seq.) and cases cited therein.

But the prospect of astronomical costs if condemnation was restored to did not end there. There was still the question of damages. Aside from damages to the Chicago Park District (and how were these damages to be figured when there was no land in the vicinity to acquire at any price as substitute facilities?), there was the most serious question of damages to McCormick Place. The planned construction seriously impairs the access which McCormick Place had before the taking. The planned construction eliminates so many parking places that it might totally destroy the practical use of McCormick Place. How are these damages to be assessed? As a total loss of the economical use of the building for expositions and conventions? There is no land available in the vicinity for an alternative site.

These problems while not legally insoluble foreshadowed possible unacceptable costs.

As an alternative, years of discussion between the City, the State and the Chicago Park District resulted in the agreement for acquisition which is the basis of the reimbursements now claimed by the City.

IV. *The Terms of the Agreement between the City and the Chicago Park District.*

In synopsis, the Park District conveyed to City an easement in perpetuity in Parcels 18-75A and B for all street and highway purposes and temporary easements in T-1 and T-2 for construction purposes. The Park District also undertook to get Authority's consent to the amendment of the lease and permit between Park District and Authority so as to eliminate any interest of Authority in the parcels acquired by City. This was subsequently done.

City undertook to construct the improvement in the property taken according to specified plans and also to construct a service drive immediately to the east of property acquired in accordance with said plans and specifications, and to construct the entire improvement at no expense to the Park District.

The City further agreed, at no cost to Park District, to fill in approximately 14½ acres of Lake Michigan adjacent to Park District property and to construct along the shoreline of this acreage a dock wall substantially of the same character as that located in the vicinity, such fill to be completed by the City prior to the construction of the improvement in the property acquired from the Park District.

The City agreed to permit the Park District or its assignees to use the portion of the highway space east of northbound S. Lake Shore Drive, including the portion thereof lying under the northwest ramp, as parking area subject to such restrictions as might be imposed thereon by the regulations or requirements of the Bureau of Public Roads.

City agreed to surface for parking an area in the filled space equivalent to the parking area taken by the City.

City agreed to secure adequate insurance and to coordinate the work of construction within the space taken from the Park District and the area to be filled with the Park District.

V. *Legal Authority for the Agreement.*

On August 19, 1964 the firm of Rigueimer and Rigueimer submitted to Chief Engineer, Department of Public Works, City of Chicago, an opinion as to legality of the provisions incorporated in the agreement between the Park District and the City. A copy of this opinion is attached hereto as Exhibit "D".

VI. *Permanent Easement vs. Fee.*

At the conference of March 15th the questions were raised as to why a permanent easement was taken rather than the fee and as to whether the compensation for a permanent easement would be the same as for the fee.

The question of acquiring a fee was broached to the Park District. The Park District had grave reservations as to its right to convey the fee. These reservations are set up in letter of November 12, 1965 from the Park District to the City which is attached hereto as "Exhibit E".

As to whether the property owner would be entitled to the same compensation for a permanent and exclusive easement as for the fee, in Illinois the courts have held that the property owner is entitled to the fair cash market value of his property where a permanent easement is taken. *Seaton v. Union Stock Yard Co.*, 200 Ill. 244, 250. This is the rule generally in condemnation cases, Nichols on Eminent Domain Third Ed. Vol. 4 Section 1241 (2) pp. 277-279 where the commentator says:

"Nevertheless, when land is taken for such purposes as a highway or a railroad, which require a permanent and substantially exclusive occupation of the surface, the distinction between the taking of the fee and of the easement has no practical application in the determination of the compensation to be assessed for the land actually taken. While the damages to the owner's remaining land may be less if the use of the land taken is limited by the nature of the easement, the interest remaining in the owner of the fee in the land taken is in such case of nominal value, and he is awarded the same measure of compensation for the land actually taken as if the fee was acquired by the condemning party, namely, the full market value of the land."

VII. *The Leyden Appraisal.*

From what we have heretofore pointed out herein, it appears that Mr. Leyden's appraisal of the value of the part taken and damages to the remainder is on the conservative side. This appraisal was extremely difficult to make in that there is no opportunity to obtain replacement land except for filling in the lake.

Mr. Leyden's appraisal of \$4.00 a square foot for the property to be taken appears extremely conservative when it is realized that *the air-rights* above the Illinois Central tracks at 23rd St. (immediately across S. Lake Shore Drive from the property in question) are under contract to be purchased on the basis of \$10.00 a square foot, if the Illinois Central Railroad establishes its title to such property in a pending suit.

VIII. *Summary.*

If all the difficulties hereinbefore detailed, which the acquisition of the required property by condemnation would raise would be successfully met, it would still appear that there was a good chance that the compensation eventually awarded might greatly exceed Mr. Leyden's estimate of value of \$4,246,345. The State of Illinois and the City of Chicago were convinced that the quickest and most economical way to acquire the required property was to enter into the agreement consummated with the Park District. This served to eliminate all possible claims of the Metropolitan Fair and Exposition Authority and to make it possible to acquire the property at the cost of the undertakings on the part of the City to the Chicago Park District. The City presently has bids on the required work of \$2,979,546.70. Adding 10% for contingencies and engineering the cost to City would be \$3,277,000—almost \$1,000,000 less than Mr. Leyden's estimate.

It is submitted that the expenditures for which federal reimbursement is sought are clearly eligible for such reimbursement and such reimbursement should be approved.

Section B. WATERWORKS AND SEWERS

“WATER SUSPENSE ACCOUNTS”

(*Commissioner of Water & Sewers—W. M. Z.—January 17, 1962*)

Please refer to your communication with reference to the above subject matter.

Section 8-1-11 of the Municipal Code provides that:

“The commissioner of water and sewers shall cause to be opened in the general ledger of the bureau of water two accounts, to be known as the suspense accounts number 1 and number 2. In suspense account number 1 shall be shown the totals of all of the accounts and items which may be ordered transferred under any section relating to frontage rates accounts; and in suspense account number 2 shall be shown the totals of all the items which may be ordered transferred under any section relating to meter rates accounts.

“The commissioner of water and sewers shall provide suitable detailed ledgers, in which the detailed accounts of suspense accounts number 1 and number 2 shall be kept and shown. All accounts affected by order of court and recommendations of the corporation counsel shall come within the scope of this section (Passed. Coun. J. 11-10-52, p. 3412)”

An examination of the records kept by your department and the records of your accounts forwarded to our department for collection, indicate that every effort has been made to collect the water suspense accounts from the year 1935 through the year 1952.

It is our opinion that these accounts are uncollectible and under modern accounting methods should no longer be carried on your records as a valuable asset. You, no doubt, are aware that the statute of limitation on open accounts is five (5) years.

It is our opinion that the items in suspense account from the year 1935 to the year 1952 are uncollectible and should be stricken from your records.

RESPONSIBILITY FOR WATER CHARGE COLLECTION

(Acting City Comptroller—W. M. Z.—November 10, 1964)

Please refer to your communication of October 8, 1964, wherein you state as follows:

“Peter Shannon and Company, Certified Public Accountants, for the past several years have been making an examination of the accounts and procedure of the Water Collection Division of the Department of Water and Sewers. In their report they have included a comment to the effect that ‘it is our understanding that responsibilities of the Water Collection Division with respect to sewer rentals are restricted to billing and recording collections received. We understand the Corporation Counsel’s office is to determine enforcement measures applicable.’

“Do you agree with the statement that Water Collection Division responsibilities are restricted to billing and recording the collections, or are certain enforcement measures available to the Water Collection Division. On the other hand, is it your understanding and desire that all enforcement measures for non-collection of sewer rental be handled by the Corporation Counsel’s office.”

May we call to your attention the City Council’s Journal of September 28, 1964, which provides on page 5699-5700 for the regulation and monthly charges for sewer service connections for premises outside the city corporate limits. The said regulations, among other things state the following:

“Payments shall be made to the Superintendent of Water Collections at the office of the Bureau of Water upon receipt of a bill including separate items for water and sewer service charges, issued by the Superintendent of Water Collections. Upon the amount of the sewer service charge item rendered in a water and sewer service bill, there shall be allowed a discount of eight per cent, provided the bill is paid within ten days of the date the bill therefor is mailed, as shown by the records of the Bureau of Water.

“The Commissioner of Water and Sewers is directed to cause notice in writing to be sent to all persons to whom permits have been issued and under which such sewer connections are now maintained informing them of the provisions of this order, in order that they may make arrangements to pay such monthly service charges or discontinue the disposal of such sewage through such connections into the City’s sewers. The Commissioner of Water and Sewers is also directed to cause a survey to be made to find and locate all existing connections with the City’s sewers for the disposal of sewage originating outside the corporate limits which have been made without a permit and to cause a notice in writing to be sent to all persons responsible for or benefiting from such connections informing them of the provisions of this order and notifying

them that it will be necessary to secure Council authority and City permits, and to pay such monthly sewer service charges or discontinue the disposal of such sewage through such connections into the City's sewers. The Commissioner of Water and Sewers is further directed to cause bills to be sent by the Superintendent of Water Collections to all persons from whom sewer service charges should be collected as reported by the Deputy for Sewers, itemizing the charges for sewer service according to this order.

"In applying the above table of charges for sewer service, the amount due for a single connection serving a single building shall be as set forth in the table. In the case of a single connection serving two or more buildings, the Commissioner of Water and Sewers shall fix the amount to be charged for such connection so made in accordance with the rate set forth in the above table, multiplied by the number of individual building connections discharging through the single connection to the City sewers."

And :

"The accounts of the Department of Water and Sewers shall show all amounts collected as sewer-service charges and the City Comptroller is directed to keep a separate account of all such amounts so collected."

It is our opinion that the Superintendent of Water Collections acts only as an agent for the purpose of receiving and forwarding the collections made. All accounts that are uncollected should be turned over to the Department of Law, who are authorized to enforce the collection of accounts by regular means as provided for in page 6 of the Municipal Code of Chicago. Our office has made a study of this matter and advises that the bills are sent out by the Superintendent of Water and in the event that payment is not made, the matter is referred to the Bureau of Sewers. The Bureau of Sewers by letter, phone and personal visits, attempts to make collections and when that fails, the accounts are turned over to the Corporation Counsel's office for legal action.

We trust that this information will be of assistance to you.

NO ARMED GUARDS FOR CENTRAL FILTRATION PLANT

(Purchasing Agent—R. L. H.—March 25, 1965)

Your recent letter requests our review and advice on the above cited proposed specifications for guard service.

The first point raised in your letter is whether or not the guards should be armed. Chapter 38, Section 24-2 (4) of the 1963 Ill. Rev. Stats. and Section 193-30 of the Municipal Code of Chicago give watchmen the right, in the course of their employment, to carry concealed weapons. Use of these weapons is regulated by Chapter 38, Article 7 of the 1963 Ill. Rev. Stats. and Section 193-29 of the Municipal Code of Chicago, the former setting forth the criteria for justifiable use of force and the latter referring to the prohibition against firing guns in the city limits except by peace officers, or persons called by these peace officers to aid in either making an arrest or preserving the peace. In the light of the foregoing, and as a practical matter, we cannot see any benefit to the city in arming the guards who will serve as gatemen at the entrance gate to the filtration plant. There may possibly be more need to arm the guards on patrol service, but, we believe that it is not within our province to make a recommendation in this regard in either instance, gate or patrol, and believe that the using department should make this determination based upon their experience and knowledge regarding trespassers and/or saboteurs at a water filtration plant.

The second point raised in your letter appears to apply solely to the guards on patrol duty since it is our interpretation of the proposed specifications that the guards assigned to gate duty will not leave the gate-house at any time for any reason whatsoever. Apprehension and/or eviction of trespassers should be included in the regular duties of the guards on patrol service, again subject to the provisions of Chapter 38, Article 7, but said apprehension and/or eviction should be governed by the desires of the using department and the on-the-scene determination by the guard as to whether he can handle same alone. The Police Department will be available to answer calls for aid in this regard without question.

The third point raised in your letter refers to "posting" to establish trespass from a legal aspect. Chapter 38, Section 21-3 of the 1963 Ill. Rev. Stats. provides that notice to a trespasser must be given as a condition precedent to an arrest for Criminal Trespass to Property. This notice provision can be met, pursuant to the statute, by posting a written or printed notice conspicuously at the main entrance to the plant prohibiting entry by persons other than those duly authorized to be there. "Posting", therefore, would be proper.

Basically, it is our opinion that the proposed specifications as submitted are legally sound and sufficient. We do believe, however, and herewith submit a proposed form, that an indemnity and hold harmless clause should be included to definitely remove any liability of the city for any acts of the guards which may be actionable in a court of law.

INDEMNITY.

Contractor shall indemnify and defend, keep and save harmless the city, its agents, officials and employees against all suits, claims or causes of action arising out of the performance of this contract, and the contractor shall, at his own expense, pay all charges of attorneys and all costs and other expenses arising therefrom, or incurred in connection therewith, and, if any judgment shall be rendered against the city, its agents, officials or employees in any such action, the contractor shall, at his own expense, satisfy and discharge the same.

If we can be of any further service to you in this matter, please feel free to call upon us at your convenience.

SEWER CONSTRUCTION

(Commissioner of Public Works—R. L. C.—February 2, 1967)

Reference is made to your request for an opinion of the Law Department relative to the rights of the City to use the sub-surface land under Lawrence Avenue for the construction of a deep tunnel sewer system.

The material which accompanies your request describes the deep tunnel sewer system as an "Underflow Plan" and calls for the construction of a series of deep tunnels some 250 to 400 feet beneath the surface and running for a distance of 4.17 miles under Lawrence Avenue.

Chapter 24, Section 11-109-1 of the Illinois Revised Statutes (1965) expressly gives the City the authority to construct sewers:

"The corporate authorities of each municipality may construct, repair, and regulate the use of culverts, drains, sewers, and cesspools."

The City has the authority to construct tunnels by reason of the express grant in Chapter 24, Section 11-107-1:

"The corporate authorities of each municipality may construct, repair, and regulate the use of bridges, viaducts, and tunnels."

The City also has the exclusive right over the use of its streets by reason of Chapter 24, Section 11-30-2 and this right has been held to include the right of the public authority to "change the grade, build sewers, drains, culverts, lay water pipes and make or cause to be made various other improvements." (*Elmhurst National Bank v. Chicago* (1959), 21 Ill. App. 2d, page 180.)

The City's right in the proposed route is established as a matter of record in the Bureau of Maps and Plats, which has informed me as follows:

"West Lawrence Avenue is a public street 80 feet in width which was acquired by condemnation proceedings. West Lawrence Avenue between North Austin Avenue and the North Shore channel is a public street 66 feet in width acquired by subdivision, except that part of the north 33 feet between North Sacramento Avenue and the North Shore channel; also, the south 33 feet between North Kimball Avenue and a line 424 feet east thereof, which are indicated as open streets but for which no source of information as to how they were open is available; however, it is apparent that the City has prescriptive rights in the same. North Harding Avenue between West Lawrence Avenue and West Berteau Avenue is a public street by subdivision 66 feet in width."

Whether the location and character of sewers is useful or desirous for municipal purposes has been held by the Illinois Supreme Court (*City of Chicago v. Sanitary District of Chicago*, 1916, 272 Ill. 37, 111 N. E. 491) to be a question solely for the determination of the City, subject to review only when there is an abuse. From the supporting documents and data which accompanied your request for an opinion, and which I assume will be incorporated in your application, it seems extremely doubtful that the character of the subject project could be successfully attacked as an abuse of authority (See also *Schoeffler v. Village of Oak Park*, 1965, Ill. App. 2d 454, 212 N. E. 517).

Section C. TAXATION OF CITY PROPERTY

TAXATION OF LIBRARY PROPERTY

(*Chicago Public Library—B. W.—April 2, 1962*)

You recently forwarded to us three (3) general tax bills sent to the Chicago Public Library Volume No. 316, items 497-498-499, representing general taxes for the year 1961 on property acquired by the Chicago Public Library on May 24, 1961, the semi-annual installments on these parcels being 230.09, 277.64 and 316.21, respectively.

After examination of the various legal documents in connection with the purchase of these properties by the Chicago Public Library, particularly the closing statement which was part of the Chicago Title and Trust Company, Escrow Agreement No. 260781, dated May 24, 1961, it appears that the Chicago Public Library, the purchaser, was given a credit of \$626.77 for general taxes on Lots 1 and 2, by the sellers, said credit being pro-rated on the basis of the sellers, Joseph S. and Hilman L. Vinci, being liable for general taxes for the period of January 1, 1961 to July 31, 1961.

Inasmuch as the Chicago Public Library has already been given this credit on the 1961 general taxes for lots 1 and 2 it follows that the Chicago Public Library would be liable for the full amount covering both semi-annual shown to be due on each of these 2 lots represented by Volume 316, items 497 and 498, Permanent Index Numbers 13-11-403-005 and 006.

Concerning Lot 3 represented by 1961 general tax bill bearing Permanent Real Estate Number 13-11-403-004, Volume 316, Item No. 499, each semi-annual installment being in the amount of \$230.09, the Escrow Agreement,

dated May 24, 1961, specifically states that the North Park College and Theological Seminary agrees to assume and pay the entire 1961 general taxes on Lot 3. This tax bill should be forwarded to them or their agents.

You further inquire as to the initiation of appropriate injunction proceedings on behalf of the Chicago Public Library as to these Real Estate Tax Bills for the year 1961.

Please be advised that in our opinion it would not be legally justified because these properties were acquired by the Library subsequent to January 1, 1961, and you thus became legally liable for the payment thereof as to Lots 1 and 2, subject however, to the above indicated proration and assumption of payment by the College as to Lot 3.

DRIVEWAY FEE

(Commissioner, Department of Streets and Sanitation—E. W. P.—August 14, 1962)

We refer you to application for Driveway Permit, No. 62-0436, and the correspondence that you have from the law firm of Bateman, Daniels, Ross and Sodaro, the last letter being dated May 28, 1962.

The Don-Laurie Building Corporation through their Attorneys submitted the request for the driveway and also submitted at the same time a statement of all existing driveways and the requisite fees for certain driveways which the Don-Laurie Building Corporation desires, to maintain and use. It appears that the Company became the owner of the property in 1945 and since that time has used one of the driveways that were in operation at the time of their possession and in addition thereto the Company in 1960 took out another permit and opened a new driveway on Keeler Avenue just south of the intersection of Grand Avenue and now wish to open another driveway on Keeler Avenue just south of the presently existing one.

You have not issued the driveway permits for the reason that the Company has taken the position that in the two driveways on Kedvale Avenue and the five driveways on Grand Avenue used by the former owners are not their obligation or responsibility, that because they were not the original permittees when these driveways were put in and have never assumed the obligation to pay these permit fees by the execution of any bond or contract with the City and have never impliedly agreed to pay the fees because they have never made use of the driveways that it is your position that you will not issue the permit for the new driveway.

You also attach copy of the opinion of the Corporation Counsel dated March 22, 1962, in which we expressed our views that inspection fees in general are incidental to the property itself and that we should look to the present owners for payment, that fees for these services are charged for the maintenance of the property and were perspective at the time of the inspections.

We are not deviating in any way from this opinion. However, we do know that Hon. Daniel J. Ronan, Alderman of the 30th Ward, and the people in the Community are very anxious to have this new driveway installed for the benefit of the neighborhood. The Attorneys for the owners have taken the position that regardless of the obligation on the part of their client for fees for existing driveways, that this is a separate and severable matter from its right to a permit for the new driveway.

It is our opinion under all of the circumstances that the permit or permits for the new driveway should issue and that you should refer all of the data on the fees due for the existing driveways to the Law Department for suit against both the present owner, the prior owner and the bonding company.

CHAPTER XII—CONTRACTS

Section A. BIDS AND AWARDS

AWARDS BASED ON PERCENTAGE COMPLETION

(J. F. W. —J. G. O.—January 6, 1961)

We are in receipt of a letter dated December 9, 1960, concerning the subject contract which was forwarded to you by Commissioner DeMent, in which the Commissioner asks (1) that final payment under this contract be based on the original estimated cost of the project, namely, \$8,277,500.00 and (2) that a Change Order be issued authorizing the contractor to proceed with plans for a fixed type bridge as contrasted with the bascule bridge under this original contract.

The contract provides in part for payment as follows:

"Section 3. Payments.

(a) Department, for and in consideration of the rendering of the engineering services heretofore or hereinafter enumerated, shall pay to Engineers the total fee hereinafter established and in the following manner:

(1) Upon receipt of monthly invoices from Engineers covering the work performed in the previous month, and the approval thereof by Department, a sum of money equal to ninety percent (90%) of the amount arrived at by multiplying the percentage of design work performed by the approved estimated construction cost of Project and multiplying the product thus obtained by the fee hereinafter set forth. From the partial payment thus computed each month, there shall be deducted all previous partial fee payments made to Engineers:

Section 9. Abandonment and Termination.

(a) If Department shall abandon the services mentioned by giving Engineers thirty days notice in writing, Engineers shall deliver to Department all field survey notes, preliminary plans, contract plans, contract documents, special provisions, detail specifications, estimates of costs, and other documents mentioned under Section 10, completed or partially completed, and these shall become the property of Department. The earned value of the work performed shall be based upon an estimate of the portion of the total services as have been rendered by Engineers to the date of the abandonment, which estimate shall be mutually agreed upon by Chief Engineer and Engineers. Such payment so made to Engineers shall be in full settlement for their services hereunder.

Section 14. Basis of Payment.

Total payment for the work to be performed under this Agreement, except for survey work mentioned in Section 3 (c) and 3 (d), shall be in an amount equal to Five percent (5%) of the contract construction cost of Project, and it is hereby understood and agreed by the parties to this Agreement that such construction cost shall be a sum equal to the total of the amounts bid by the accepted low bidders for the particular contracts of Project."

Referring to the letter of June 7, 1960, written to you by Commissioner DeMent, you were advised that no formal notice of termination was given to the contractors, but that verbal notice to suspend work was given in November of 1958.

On the last invoice submitted by the Contractor in December of 1958, an estimated construction cost of \$6,250,000.00 was used as the basis for determining the amount of the total fee then due for the percentage (28.2) of the work completed as of the date shown on the invoice.

In view of the above, it is our opinion that the contractor has been paid all that was due and owing under the terms of the agreement.

Also, you advised us that none of the plans which had been prepared by the consultants for the proposed bascule type bridge can be utilized for the construction of the fixed type bridge which is now going to be built in place of the bascule bridge. In view of this, and also in view of the fact that this is in the nature of a new design project, it is our opinion that contract No. 19114 for engineering services should be terminated in accordance with the terms of the agreement and that a new agreement for consulting engineering services for the fixed type bridge should be effected.

BIDS EXEMPT FROM SALES TAX

(Purchasing Agent—C. F. V.—September 6, 1961)

Returned herewith pursuant to your recent request are contracts Nos. 22655 and 22654 in accordance with the above cited specifications.

Be advised that the State of Illinois, Department of Revenue, has made the policy decision not to collect relevant sales taxes on the proceeds of City contracts when the bid opening for such a contract was held prior to August 1, 1961, the effect date of the tax. The decision is apparently predicated on the theory that such a contract is bound as far as the bidder is concerned because the bid could not be withdrawn, according to the contract terms, for a stated period.

However, where requirements contracts are involved, each sub-order issued pursuant thereto is considered a separate contract; and hence, the proceeds of sub-orders issued subsequent to August 1, 1961 are taxable. Nonetheless, the Department of Revenue has given verbal assurances that in the case of the City, tax will not be collected on the proceeds of sub-orders for requirements contracts bound prior to August 1 on the theory that budgets are established for payment under such contracts. Such reprieve extends only to December 31, 1961, the end of the City's fiscal year.

We recommend, therefore, that you request, the successful bidders under the subject contracts to execute an agreement to reduce their quoted prices by the amount of said taxes included and that you inform them that a letter of exemption will be issued with payment against invoices on sub-orders made prior to January 1, 1962, but that subsequent to that date, should the extension option be exercised, invoices should include the amount of such taxes and that such taxes should be separately stated on those invoices.

The agreement referred to should take the form as that included with our letter dated August 28, 1961 covering contract No. 22659 (Schuster Equipment Co., Spec. No. 22-61-168); be executed in triplicate and bound in with the contract documents; the letter of exemption, to be issued by the City Comptroller, should take the form as that included with that same letter.

Subject to the foregoing, the provisions of Sec. 7, Chap. 26 of the Municipal Code and subject further to the propriety of accounting charges therefor, it is our opinion that when the contract is signed by the Purchasing Agent, the City Comptroller and the Mayor, this will be a valid and binding contract.

NECESSITY FOR BIDS FOR REDEVELOPMENT PROJECT

(Commissioner, Community Conservation Board—M. C. H.—September 18, 1961)

This is to acknowledge receipt of your letter to this office requesting our opinion relative to the following statement in the Hyde Park-Kenwood Urban Renewal Plan as approved by the City Council on November 7, 1958: "It is recommended that C-6 and C-7 be made available to local merchants affected by clearance in the Hyde Park-Kenwood area."

Your first inquiry is:

"1. May the City enter into direct negotiations with the corporation mentioned above without inviting proposals from all interested redevelopers? (Reference paragraph 91.13, section 6, of the Urban Community Conservation Act and section 14-3-6, of the Urban Renewal Manual of the Urban Renewal Administration—Housing and Home Finance Agency.)"

While it is true that the Urban Renewal Manual of the Urban Renewal Administration—Housing and Home Finance Agency has provisions (Section 14-3-6) for negotiated disposal of land for private redevelopment "to a person who has been displaced or is to be displaced from residential or business occupancy in an urban renewal project being carried out by the LPA, of a suitable site to enable him to re-establish his home or business," however, the Illinois Urban Community Conservation Act (Ill. Rev. Stat., Ch. 67½, Sec. 91.13, par. 6) provides as follows:

" * * The Conservation Board shall by public notice by publication once each week for two consecutive weeks in a newspaper having general circulation in the municipality prior to the execution of any contract to sell, lease or otherwise transfer real property and prior to the delivery of any instrument of conveyance with respect thereto, invite proposals from and make available all pertinent information to redevelopers or any person interested in undertaking to redevelop or rehabilitate a Conservation Area, or any part thereof * * *".*

" * * The Conservation Board may negotiate with any persons for proposals for the purchase, lease or other transfer of any real property acquired pursuant to this Act and shall consider all redevelopment and rehabilitation proposals submitted to it and the financial and legal ability of the persons making such proposals to carry them out. The Conservation Board, as agent for the Municipality, at a public meeting, notice of which shall have been published in a newspaper of general circulation within the municipality at least fifteen but not more than thirty days prior to such meeting, may accept such proposals as it deems to be in the public interest and in furtherance of the purposes of this Act; provided that, all sales or leases of real property shall be made at not less than fair use value * * *". (Italics supplied.)*

It is our opinion that the above quoted requirement as to the Conservation Board's giving public notice by publication is applicable to sales of parcels to such displaced persons as well as to other private redevelopers. The provision in the second paragraph above quoted that the Conservation Board may negotiate with any persons for proposals for the purchase of real estate does not, in our opinion, lend itself to a determined construction, as derogating from the requirement as to giving public notice by publication contained in the first paragraph above quoted, or serve to dispense with the necessity of giving such initial notice, for the reasons that said second paragraph does

not specifically negate the prior publication, and that proposals received in answer to such an invitation by public notice may not be 100% responsive to the invitation and that such failure to secure agreement may necessitate further negotiation to effect a completed agreement with a purchaser.

In our opinion the provision in the plan, above quoted that C-6 and C-7 be made available to local merchants affected by clearance in the area is not a definite commitment, but by its very terms a mere recommendation, nor are such local merchants thus displaced in the category of redevelopers who are engaged in non-profit institutional use, for the reason they are not non-profit educational, charitable, hospital, church or other eleemosynary institutions.

Moreover, in view of the fact that there are presumably many prospective redevelopers ready to submit proposals for such parcels, to dispense with public notice by publication might tend to curtail competitive bidding and to invite consequent litigation.

We conclude, therefore, for the reasons above stated that the City may not enter into direct negotiations with the corporation mentioned in your letter without inviting proposals from all interested redevelopers by means of giving public notice by publication as required in the statute above quoted.

Our opinion is further asked in said letter to this office:

"2. Is a national or state-wide chain which has operated a store displaced by urban renewal in Hyde Park-Kenwood a local merchant? Is a merchant who operates two or more stores with at least one located in the Hyde Park-Kenwood Urban Renewal area local merchant?"

In our opinion a national or state-wide chain which has operated a store displaced by urban renewal in the Hyde Park-Kenwood Renewal area is within the category of "local merchant" and a merchant who operates two or more stores with at least one located in such area is a "local merchant".

We find no distinction in the law between a merchant who has been or will be displaced by an urban renewal project on the mere basis of the merchant's being a national or state-wide chain, or an individual who has other stores outside the area, and we conclude that the sole criterion of being included within the term "local merchant" is that such operator has been or will be displaced by the urban renewal project, without other qualification as to type of organization or having other stores locally or nationally outside the area. Our opinion in this matter is supported by the definition of "business concern" appearing in Subsection 3.101 of Section 16-3-1 of the Urban Renewal Manual defining a business concern as "A corporation, firm, partnership, individual or other entity engaged in some type of business or profession necessitating fixtures, equipment, store in trade or other tangible property for the carrying on of the business or profession."

TAX NOT INCLUDED IN BIDS

(Purchasing Agent—C. F. V.—January 5, 1962)

Your letter of December 28 requests our opinion concerning the effect of the bid submitted by William Adams Engineers, Inc. in response to the above cited advertised specifications.

The bid submitted was a lump-sum price for construction of a heating and refrigeration system at the site. Below the price quoted is bidder's type-written statement "No Taxes Included".

The "Addendum Relative to Taxes" appearing in the Specifications instructs bidders as follows:

"Federal Excise Tax does not apply to materials or services purchased by the City of Chicago. The prices quoted herein by bidders shall be deemed conclusively to include all other direct and/or indirect Federal, State and Local taxes which apply".

Under "General Conditions" the following insertion (quoted below in part) was indicated to be made by the same addendum:

"Contractor agrees to submit to the City Comptroller a statement setting forth an accurate estimate of the amount of the bid price attributable to [certain Illinois Sales Taxes] which may have been applicable to the purchase by contractor or sub-contractors of materials sold or transferred to the City in the construction contemplated by this contract. * * *"

In light of the above clauses, it is our opinion that bidder's qualifying statement, "No Taxes Included", does not affect the validity of the bid. The initial instruction directs bidders to include all taxes "*which apply*". On the transaction between the City and Contractor no tax applies; as between the City and contractor, the construction contract is not an incidence of taxation. Since no tax applies on the contract, bidder's statement is extraneous, unnecessary information. The manifest purpose of this clause is to provide a basis for bid evaluation. This purpose has not been destroyed.

This is not to imply that no tax liability will be incurred by the successful bidder. It must be presumed that contractor knows the law and his obligations thereunder. Numerous taxes, federal, state, and local, may arise on contractor's income, and purchase of materials and services in fulfilling his obligations under the contract. However, these items are part of contractor's overhead, and, like any other item of cost, contractor may, but need not, pass such cost on to the City in computing the bid.

Thus, the purpose of the second clause above quoted becomes evident. It provides that the amount of the bid price attributable to any Illinois "sales" taxes shall be disclosed. It does not *require* that such taxes, which are a cost item to contractor, be shifted forward to City. By his qualifying statement, this bidder indicates that he chooses not to shift forward such cost and that no amount of the bid is attributable to such taxes.

In answer to your specific questions, therefore, (1) bidder is not disqualified by his statement "No Taxes Included", and (2) the City would incur no liability over and above the bid price by reason of bidder's statement.

CERTIFIED CHECK UNACCEPTABLE

(Purchasing Agent—C. F. V.—January 17, 1962)

Your letter of January 11 requests our opinion as to whether or not a bidder may substitute a certified check for the bid bond mistakenly deposited with his proposal. It is presumed that the desired substitution would be made after bids have been opened. Your letter notes that bidder was unaware of the recent amendment to Chapter 24, Division 10, Section 8-10-7, Ill. Rev. Stat., 1961, whereby bid bonds were removed as permissible deposits in good faith.

It is our opinion that you may not permit bidder to substitute his check for the bid bond submitted.

Bidder may not claim that he was unaware of the amendment. The advertisement states the character of acceptable bid deposits; it does not include bid bonds.

The legislature, in removing the bid bond as a permissible deposit, impliedly excludes such bonds as acceptable. Since unacceptable initially, the bid bond may not now be substituted with a deposit of acceptable character because such substitution would constitute a material change in specifications.

In the specifications as advertised, the section entitled "Bid Deposit" under Requirements for Bidding and Instructions to Bidders states that "any proposal submitted without being accompanied by such cash, check or Comptroller's Certificate when required *shall be considered informal and be rejected*". (Emphasis supplied.) The requirement is thereby mandatory, not discretionary.

Your letter suggests that the best interests of the City may be served by permitting the substitution. The following statement appears under "Consideration of Proposals" (page 2 of Requirements for Bidding, Etc.): "The Purchasing Agent reserves the right to * * * disregard any informality in the bids and bidding, when in his opinion the best interests of the City will be served by such action." We believe that the mandatory provisions of the section covering "Bid Deposits" withdraw the alleged error from the scope of the phrase "any informality in bids"; the City, bound by its own specifications, must reject the bid.

BID SPECIFICATIONS

(Purchasing Agent—C. F. V.—February 21, 1962)

Your letter of January 23 requests our opinion concerning omission of tax statement on bids received in response to the above advertised specifications.

Instructions to bidders posit a conclusive presumption that bid prices include all taxes which apply. Bidders further were instructed to separately state the amount of the bid price attributable to applicable Illinois Occupation and Use Taxes, shifted forward to or imposed upon the City and included in the total bid price. Implementing these instructions, the proposal page has three lines: The first undesignated, the second characterized "Applicable Occupation or Use Tax", the third designated "Total".

Four bids, hereinafter designated A, B, C, and D, were received. Bid A indicated a price of \$5.29 on the first line of the proposed page, typed the word "None" in the space on the second line, and left blank the third line. Bid B indicated on the first line the price \$6.20 and left blank the second and third lines. Bid C indicated \$6.75 on the first line, typed the word "None" on the second line, and indicated \$6.75 on the line designated "Total". Bid D indicated \$6.80 on the first line, drew a line through blank spaces on the second line and indicated \$6.80 again on the third line; we judge that the line drawn through blank spaces of Bid D is equivalent to the word "None".

It is our opinion that all four bids are invalid. All bidders affirmatively indicate that tax is not included. This may not be ignored because Illinois Occupation and Use Taxes directly apply on this transaction, occupation tax on the seller, use tax on the buyer. Use tax may not be absorbed by seller.

The conclusive presumption posited by the instructions was intended to apply to total prices. However, those bidders who show a price at the line marked "Total" indicate that no tax is included by affirmative statements in the space provided for taxes. The presumption cannot apply to the other bidders because no "Total" is shown.

It is impossible from the proposals submitted to determine what the final price would be. Tax is either 3½% or 4%, depending upon bidder's choice of shifting forward or absorbing any applicable Municipal Retailers Occupation Tax. Even though three of the bidders give out-of-state addresses,

they may nonetheless be subject to MROT if offices or agents are maintained in this state.

A definite price, or method of determining same, is a material term of and essential for entering a binding contract. Since the price term is indefinite here, none of the bids would form the basis for a binding contract, and corrective changes affecting material contract terms, may not be made in bids after they are opened.

There exists substantial basis for the exercise of your discretion to reject all bids and readvertise the specifications.

COUNTER-OFFER

(Purchasing Agent—F. O.—April 5, 1962)

Returned herewith in triplicate, without approval thereon, is the above cited contract No. 23118.

An examination of this contract reveals in the first paragraph of the supplement to the detailed specifications under date of March 6, 1962, the following clause inserted by the contractor:

"This will supplement the detailed specifications requested on Sheet D-1 of your Contract Document 19-62-30, and specifications are as follows. The material will be firm until June 30, 1962, at which time it may be necessary to review this proposal."

It is our interpretation of the contract that same is for the term, commencing April 1, 1962 to December 31, 1962 (See page D-1, par. entitled "Scope"); and may be extended by the Purchasing Agent for 6 months thereafter (id. paragraph entitled "Extension") for fixed prices during said term.

Be advised, therefore, that it is our opinion that the above delineated provision, inserted by the above cited contractor, is tantamount to a counter-offer which cannot result in a binding and valid contract.

REDUCTION OF A BID

(Purchasing Agent—R. L. H.—April 6, 1962)

Your letter of April 3, 1962, requests our opinion as to whether the bid of Zico Sales can be accepted on the basis of a lump sum price for the two pumps specified when the proposal page indicates bids to be made on an "each" basis.

With your letter you transmitted copies of this bidder's proposal; a letter of clarification from this bidder, and the bid tabulation on this specification. You also advised our office that the apparent low bidder has been disqualified since its pumps do not meet the specifications, thus causing this bidder to become low bidder.

It is here possible that the specifications were ambiguous insofar as requesting either a lump sum or unit price bid, and the bid made was thus also ambiguous. As appears from bidder's letter of clarification, he bid lump sum for the two pumps required instead of unit price for each of the two. The fact that the next bidder bid likewise is evidence of the am-

biguity of the specifications. Accordingly, payment based on a corrected bid price would be authorized. See Comp. Gen. Op. No. B-147842.

When an ambiguous bid was clarified by the bidder subsequent to the opening of bids, and the clarified bid was the most advantageous to the government, it was permissible for the government to accept it. 39 Comp. Gen. 546 (1960).

There is also sufficient law and opinions allowing a low bidder to reduce his bid after bid opening if he desires to do so. *Sanitary District of Chicago v. McMahon & Montgomery*, 110 Ill. App. 510; *Leitman T/A Lite Manufacturing Co. v. U. S.*, 104 Ct. Cls. 324; Vol. 10 Ops. Corp. Coun. 23; Vol. 24 Ops. Corp. Coun. 683.

Pursuant to the foregoing, it is our opinion that a valid and binding contract can be entered into with Zico Sales on the basis of the original bid as supplemented and modified by the letter after bids were opened.

BIDS RESPONSIVE TO SPECIFICATIONS

(Purchasing Agent—C. F. V.—April 17, 1962)

Your letter of April 3, requests our opinion regarding validity and interpretation of the bid submitted by Root Brothers Manufacturing & Supply Company in response to the above advertised specifications.

The problem presented involves interpretation of the notation "Occ. Tx on 'C' Div already included" which was supplied by bidder on page P-6 of the proposal. The part of the proposal at issue is the offer on the combination of all three divisions of the contract. As drawn, the specifications require bidder to show:

- 1) Total List Value of the three divisions combined. Bidder indicated \$1,361,245.00. This is the true sum of extended unit list prices shown prior in each division singly. This is not a variable amount in that the prices are taken from a printed catalog of list prices.

- 2) Total per cent deduction from list price as indicated at (1). Bidder indicated 58.7%.

- 3) Total Net Value of the combination offer after applying the deduction shown at (2). Bidder showed \$562,194.19. This is a correct result.

- 4) Following the Total Net Value figure shown at (3), the specifications recite "subject to% Illinois Occupation of Use Tax." Bidder inserted "3½%" at the space provided, but then added the words "Occ. Tx on 'C' Div already included".

- 5) Cash billing Terms of 5% are then shown.

- 6) The final line on the combination offer reads: "Basis of Award Divisions 'A', 'B' and 'C' combined . . . \$534,084.48." This last figure is a mathematical result of applying the designated Cash Billing Terms to the Total Net figure of \$562,194.19. It disregards the matter of tax. Although the contract contains no canvassing formula for this combination offer, the formulae indicated for all other divisions and combinations thereof are consistent and the same should be applied to this combination, namely, List price minus discount plus tax minus cash billing terms. When applying this formula to the figures shown, it becomes apparent that bidder has made a mistake in arriving at his Basis of Award figure. The mistake in patent.

It is our opinion that the bid on combined Divisions A, B and C is not responsive to the specifications and may not be reformed. Under certain circumstances, patent clerical errors may be reformed to conform to the obvious intention of the bidder. In the instant case, bidder's intention is unclear. For bidder to assert that the tax on Division "C" is already included in his list value and net value prices contradicts his figures shown under each division separately. Furthermore, if tax were included in the list value and net value prices shown, the discount offered is improperly applied because it would then be taken on the price including tax. Tax is imposed on selling price exclusive of tax, not on the tax inclusive price.

We surmise that bidder attempted to give an additional discount in the amount of the tax on Division "C" and that his words "Occ. Tx on 'C' Div already included" is tantamount to an offer not to add tax on Div "C" invoices. This view is corroborated by bidder's letter dated March 27 wherein he indicates his intention to *absorb* the tax on Division "C" orders. Such an offer may not be accepted because Use Tax is a tax on the City; this bidder is constrained to collect such tax from the City; the Use Tax Act, Section 439.7 of Chapter 120 (Ill. Rev. Stat., 1961) imposes criminal penalties for making such an offer;

"It is unlawful for any retailer to advertise or hold out or state to the public or to any purchaser, customer or user, directly or indirectly, that the tax * * * will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold * * *"

The City may be relieved of its Use Tax liability either by paying the tax directly to the State or by obtaining a receipt for payment of same in proper form from a vendor required or authorized to collect same from City. A receipt for payment without actually paying would be nugatory for lack of consideration.

The proper method of giving a "discount" in the amount of tax for bidder to increase his percentage discount term. That term may not be varied because it is unequivocal.

We do not pass on the validity of the above quoted statutory provision or on the right of the City to shift tax liabilities by contract.

We take the position that the specifications as drawn are in compliance with the tax law as written; that bidders are charged with cognizance of these laws; that this bid materially varies the specifications on the combined proposal so as to give this bidder an advantage over other bidders by ambiguous expression of his intention.

WITHDRAWAL OF BID

(Purchasing Agent—R. L. H.—June 6, 1962)

We are in receipt of your letter of May 22, 1962, to which you have attached a letter from Milo Broohe Inc. referring to their bid on Group C of the above cited specification opened on May 11, 1962, which they now wish to withdraw. Our opinion is requested as to the legality of the requested withdrawal.

An examination of the bid tabulation indicates that Milo Broohe, Inc. was the lowest bidder on Group C and was so proclaimed by your department at the public bid opening on May 11, 1962, pursuant to legal advertisement.

In his letter to your office, Milo Broohe, president of the aforementioned bidding corporation states:

"In addition we had an error of \$1,000.00 per truck or \$5,000.00 for the group and this was \$5,000.00 too little.

We appreciate the privilege of quoting you on different specifications and enjoy doing business with your efficient organization. We wish to withdraw our bid as we of course were not low only for the error."

The purchase of any material, equipment, or supplies involving amounts in excess of \$2,500.00 by a municipality of more than 500,000 population is governed by Article 8, Division 10 of the Illinois Municipal Code appearing as Sections 8-10-1 through 8-10-23 inclusive of Chapter 24 of the 1961 Illinois Revised Statutes. There being nothing therein contained to allow the city to release the lowest responsible bidder and award the contract to the next lowest bidder, it is therefore our opinion that this cannot be done. In fact, the Michigan case of *Twiss v. Port Huron*, 63 Mich. 528, held that award to the second lowest bidder after allowing the lowest bidder to withdraw was an illegal act. All provisions of the aforementioned statute applicable having been met, it is the legal duty of the purchasing agent to award the contract to the lowest responsible bidder. There being no question as to the responsibility of Milo Broohe, Inc., it is incumbent upon your office to award them the contract as lowest responsible bidder in Group C.

In the absence of equities justifying rescission, bids submitted to municipal corporations in response to an advertisement constitute irrevocable offers in the nature of options giving the municipal corporation a vested right of contract. *Carlin v. City of Newark*, 36 N. J. Super. 74; *Berkeley Unified School District v. Barnes Construction Co.*, 112 F. Supp. 396 (D. C. Calif.); *City of Hattiesburg v. Cobb Bros. Construction Co.*, 184 So. 630 (Miss.). Further, where the contract proposed provides that no bid shall be withdrawn after bid opening for a stated period of time, such provisions are valid and binding as to the bidder, again in the absence of equities justifying recession. *Kimball v. Hewitt*, 22 N. Y. St. 311; *Wheaton Bldg. & Lumber Co. v. Boston*, 204 Mass. 218; *Housing Authority of Lake Arthur v. Miller and Sons*, 239 La. 966.

The equities supporting recession of a contract for a unilateral mistake of fact have been defined as being:

- (1) the mistake must be material and substantial,
- (2) the mistake must have been palpable such that the other party knew or should have known that an error had been made,
- (3) there must have been no neglect of the legal duty to exercise ordinary care and diligence,
- (4) to enforce the contract would be unconscionable, and,
- (5) the other party must be placed in the status quo.

There is no mistake of fact allowing equitable recession where the mistake results from a neglect of the legal duty to exercise ordinary care and diligence. *Purvines v. Harrison*, 151 Ill. 219, *Douglass v. Littler*, 58 Ill. 342. Where a mistake was the result of bidder's miscalculation and said mistake could have been avoided by the exercise of ordinary care and diligence, it was not such a mistake as entitled bidder to equitable relief. *Crilly v. Board of Education*, 54 Ill. App. 371.

In the case of *Steinmeyer v. Schroepel*, 226 Ill. 9, where a mistake in adding up the computations was made, the Court stated:

"If it can be set aside on account of the error in adding up the amount representing the selling price, it could be set aside for a mistake in computing the percentage of profits which they intended to make, or on account of a mistake in the cost of the lumber to

them, or any other mistaken calculation on their part. If equity would relieve on account of such mistake, there would be no stability in contracts".

Upon award of the contract to the lowest responsible bidder, in the event he fails or refuses to perform, the deposit accompanying the bid may be forfeited as liquidated damages pursuant to the provisions therefore appearing in the proposal documents. *Robinson v. Board of Education*, 98 Ill. App. 100; *Morgan Park v. Gahan*, 136 Ill. 515. The Court in the case of *Palo and Dedini v. City of Oakland*, 79 Cal. App. 2d 739 summed up the bid deposit, the forfeiture provisions thereof, and withdrawal of bids by stating:

"Provisions requiring a deposit accompanying a bid for city contracts, or for forfeiture thereof, are necessary as a matter of public policy to protect the public interests. If a bidder were allowed without loss to himself to withdraw his bid after the bids have been publicly opened, fraudulent practices would develop. The body awarding contracts could agree to release a favored contractor if it turned out that his proposal was low as compared to other bids. Moreover, any bidder who found that in comparison with the other bidders, his bid was low, could withdraw his bid and the city would thereby lose the value of competitive bidding and be forced to pay the prices of higher bidders with no compensation to itself for the loss sustained".

In view of the foregoing as based upon the only evidence presented to us, it would be our opinion that the error in computation of the bid price by Milo Broohe, Inc. was such that it could have been avoided by the exercise of ordinary care and diligence and that it was not a palpable mistake such that equitable relief would not be available. Equities not being present which would support a recession, withdrawal of the bid cannot be permitted without forfeiture of the bid deposit.

EQUAL BID

(*Purchasing Agent—R. L. H.—June 26, 1962*)

Your letter of June 14, 1962 requests our opinion as to whether consideration may be given to a certain letter from Kensington Steel dated May 28, 1962.

It is our understanding that the Invitation for Bids in the above specification provided for a "brand name or equal", and Kensington Steel indicated on their proposal that they are bidding on the "equal". It is our further understanding that the contract documents were duly executed by the corporate president wherein all the terms and conditions therein contained were agreed to. It was necessary, however, to indicate the qualities of the product to be supplied to evidence that said product was in fact an "equal" and same was done by letter dated May 9, 1962, executed by a Sales Engineer.

The underlying problem raised by your inquiry relates to the fact that the stationery used for this explanatory letter was printed on the reverse side with a list of terms and conditions, some of which being contrary to the terms of the contract documents and at the bottom of the front side a printed statement that all sales are subject to the terms and conditions appearing on the reverse. Upon inquiry, the letter of May 28, 1962 was sent by Kensington Steel, by their president, explaining that the wrong stationery was used for the explanation of product qualities.

The basic question then is whether the terms and conditions on the letterhead of May 9, 1962, have any effect on the proposal, and if so,

whether the letter of May 28, 1962 could validly be considered after bid opening to cancel this effect.

It is our opinion that the letter of May 9, 1962 executed by the Engineer served the sole purpose and effect to explain the qualities of the proposed "equal" and no other. Therefore, the letter of May 28, 1962, merely reinforces this purpose and has no other effect whatsoever.

We do not believe that the letter of May 9, 1962 can in any manner be considered as attempting to substitute terms and conditions for those in the contract documents and thus be a counter-offer since the intention of the bidding corporation, as evidenced by the signature of its president on the proposal page of the contract documents, is to the contrary.

Since the letter of May 9, 1962, does not affect the validity of the proposal as executed by the corporate president, it is not necessary to determine what effect the second letter would have had were this not the situation.

EQUITABLE RECISSION

(Purchasing Agent—R. L. H.—July 9, 1962)

We are in receipt of your letter of July 3, 1962, with which you submit a letter from Milo Brooks, Inc. and their work papers as further evidence in support of their request to withdraw their bid without pecuniary loss.

In the light of this evidence, over and above that which was presented prior to our opinion of June 6, 1962, we deem it necessary and proper to make comments on each of the five requirements for equitable recission as set forth in that opinion, leaving the final decision in this matter in your hands.

Requirement No. 1. The Mistake must be material and substantial.

An error of \$5,000.00 on a bid of approximately \$20,000.00 appears to be material and substantial.

Requirement No. 2. The Mistake must have been palpable. Palpable errors in price bid are such that a conscientious and experienced bid evaluator should have known upon examination of the bids that an error has been made. The Purchasing Agent and those to whom primary bid evaluation is delegated by him are charged with knowledge of the "market price" of items to be purchased. If the alleged error is to be considered "palpable" it must of necessity have been found in the examination and canvass of the bids after opening and be of such consequence that it is evident on the face of the bid.

Requirement No. 3. No neglect of the legal duty to exercise ordinary care and diligence.

A determination of what is considered to be the exercise of ordinary care and diligence in the business world is better made by one who is experienced in dealing with businessmen since this must be a factual determination. If it is determined that even with the exercise of ordinary care and diligence the claimed error was made innocently, the requirement has been met. If it is found that proper exercise of said care and diligence could have prevented the error, the error was then made due to negligence and the requirement has not been met.

Requirement No. 4. Enforcement would be unconscionable.

It is quite evident that it would be unconscionable to cause a contractor to suffer a great out-of-pocket loss in the performance of a contract.

Requirement No. 5. The other party must be placed in the status quo.

Allowing a withdrawal of the bid would place the City in a position of either rejecting all bids on this Group of the above-cited specification or accepting the next lowest bid. Since our prior opinion refers to the possible illegality of the latter alternative, the former alternative would place the city in the status quo but for the expenses of a further advertisement and possible decrease in trade-in value of the property to be traded.

If in the light of the foregoing and our opinion of June 6, 1962, it is your determination that all five of the requirements have been met, it is our opinion that the bid in question could properly be withdrawn without pecuniary loss to the bidder.

In addition to the foregoing, your attention is also called to the provisions of the contract documents wherein the Purchasing Agent will accept or reject bids within 60 days and wherein the Purchasing Agent has the right to reject any and all bids where the public interest would be served in doing so.

ADDITIONAL COMPENSATION

(Chief Engineer—J. G. O.—October 15, 1962)

We have reviewed your recent letter which reads in part as follows:

"In a letter dated August 6, 1962 (copy attached), the contractor has requested that we refer his claim for watchman service from August 4, 1961 to November 3, 1961, to the Corporation Counsel for an opinion as to the City's obligation to pay this claim.

All work on this contract was substantially complete on July 31, 1961, four (4) days prior to the theoretical completion date, with the exception of testing of the pumps. Through no fault of the contractor the Commonwealth Edison Company was unable to make power available at the pumping station until August 4, 1961. The electrical hook-up of the pumps was then completed by the contractor and the pumps were ready for tests on August 16 and August 17. The performance tests were run on all six vertical turbine pumps and all of the pumps failed to meet capacities as specified in the contract. The contractor was advised to make all necessary adjustments in the equipment to satisfy the requirements of the specifications.

* * * * *

Since all work on this contract was substantially complete on July 31, 1961, four (4) days prior to the theoretical completion date and as the completion of all work was delayed by circumstances beyond the contractor's control, we requested an extension of time of ninety one (91) calendar days making the new completion date November 31, 1961. Change Order No. 1962-76, dated February 19, 1962, approved this extension of time.

On March 27, 1962 we received an invoice from the contractor in the amount of \$3,086.00 for watchmen service rendered from August 4, 1961 to November 3, 1961."

The specifications read in part as follows:

"The contractor shall furnish watchmen not only to protect the public, and those who work at or in the vicinity of the work under this contract, but to protect all materials, tools, machinery and equipment and all work performed by the contractor until said work has been completed and accepted by the Engineer."

Also, the contractor's letter of August 6, 1962, reads in part as follows:

"The Contractor shall not be entitled to any damages or compensation from the City on account of any delay or delays resulting from any of the causes aforesaid in this section, except that in the case of any delay caused by the City, or by public authorities, or by priorities, allocations, or prohibitions established by the United States of America, or by a suspension of work as set forth in Article 8.8 of the Standard Specifications and subject to the conditions stated therein, then the Contractor will be compensated for extra premiums paid by him on his bond and insurance and for wages and salaries of employees and other extra expenses of the Contractor that in the opinion of the Commissioner and Purchasing Agent are necessary only for the proper maintenance of the work and of the materials and equipment of the Contractor during or on account only of such delay or delays. The Commissioner and Purchasing Agent will determine the amount of such extra costs and expenses incurred by the Contractor on account of said delay or delays and the amount of extra compensation to be paid to the Contractor therefor, and their decision shall be final and binding upon both parties to this contract when payment of extra compensation is authorized in writing by the Mayor, the City Comptroller and the Purchasing Agent."

In view of the above, it is our opinion that you were correct in denying the contractor's claim for additional compensation for watchmen service.

PURCHASING AGENT'S REVOCATION RIGHTS

(Purchasing Agent—J. E. S.—April 19, 1963)

Your recent letter requested our advice where, in instances, contracts have been prepared, advertised, received and opened, although not yet awarded, prior to March 21, 1963, the effective date of certain therein stated legislation, as to the effect of said legislation on the contract documents.

The contract documents proper provide that in the consideration of proposals the Purchasing Agent reserves the right to reject any and all bids and to disregard any informality in the bids in bidding when, in his opinion, the best interests of the City would be served by such action. Likewise, it is provided that the Purchasing Agent will accept in writing one of the proposals or reject all proposals within ninety (90) days from date of opening bids unless a responsible bidder, upon request of the City, extends the time of acceptance to the City.

Lastly, it is provided, in the event that contractor, its subcontractors, or suppliers of either for any reason become eligible for a full or partial credit or refund, or are relieved from payment, of any tax included in its bid price, contractor agrees to repay such amounts to the City in cash in accordance with directions therefor by the City, regardless of whether or not a claim for refund is filed, or to whom eligibility to file such claim accrues.

Contractor further agrees that in the event, during the term of this contract, a reduction of the rate of any applicable tax becomes effective, or that during the term of the contract any included tax becomes inapplicable, contractor agrees to reduce its bid price accordingly.

The problem presented, results from a change imposed by supervening statute, a factor beyond the control both of the bidders and of the City. The question is whether a solution in the best interest of the City can be found which will not violate the principles of competitive bidding and which is consistent with the purpose of the statute.

As has often been noted, the rejection of all bids, after public exposure, can work an undue hardship on a successful bidder; can delay an award and consequently, an entire production schedule, and can adversely affect the integrity of the competitive bid system. Therefore, if, in your view, an award on the basis of the existing low bid would better serve the interests of the City than rejection of all proposals, this department would find no legal objection thereto. Under the unusual circumstances present in the instant case, including the fact that an independent supervening cause precludes award and strict conformance with the original specifications and the relatively minor change involved, we would likewise not find legal objection if the procedures concerning taxes, as outlined above, were followed in the instant case. The Comptroller, by the language of said section, is vested with sufficient authority, in our opinion, including withholding of final payment, in the absence of affidavit or otherwise, to determine whether the contractor has reduced his bid prices accordingly.

In view of the foregoing, your question No. 2, in our opinion, is moot as is your question No. 3 (See 40, Opinions of the Comptroller General 55).

CONTRACTOR'S INSURANCE REQUIRED

(Purchasing Agent—J. O. T.—June 19, 1963)

Your letter of May 16, 1963 to the Corporation Counsel requested an opinion as to whether or not the attached insurance policies obtained by a Contractor conforms to Contract No. 72-61-185 covering wood chipping operations at the House of Correction.

The Contract provides at page 4, paragraph b. of the General Conditions, that the Contractor shall take out and maintain such public liability and property damage insurance as shall protect the City of Chicago from claims for damages therefor. The attached insurance policies protect the Contractor, but fail to protect the City in that the latter is *not* a named insured under the policy. The Contract also requires that any subcontractor of the contractor shall be similarly protected. No subcontractor is a named insured on the attached insurance policies. If there are any subcontractors, therefore, the insurance coverage is also deficient in this respect.

Further deficiencies exist in the attached insurance policies in regard to the amount of coverages. The General Conditions of the Contract require public liability insurance of not less than \$250,000 for injuries or accidental death occurring to any one person with a limit of \$500,000 in any one accident. Form A-1378 of the Contractor's attached policy (80C223593) sets a ceiling on the coverage of \$100,000 per person and \$300,000 per accident. The amount of property damage carried is likewise deficient in that the Contract provides for a ceiling of \$100,000 property damage to any person with any one accident limited to \$250,000. The insurance policy, however, provides for a \$10,000 ceiling for any one accident and \$25,000 limit on all accidents.

The Contract in question requires that the contractor should take out such insurance as will protect the City "against any and all claims that may arise during the course of the contract under the provisions of (the) *Scaffolding Act.*" (Emphasis added.) No such coverage is specified in the attached policies.

Policy No. 80C223593 purporting to insure both automobile liability in an unlimited amount, and general public liability, provides that "This policy does not apply: (a) to liability assumed by the insured under any contract or agreement except under coverage B and D a contract as defined herein" Thus the insurance coverage for all bodily injury and property damage (coverage A and C) caused by an automobile fails to cover any

party other than the named insured who is the contractor. The remaining coverages B (bodily injury) and D (property damage) for which liability might arise through instruments or means other than by automobile will apply to liabilities "assumed by the insured under any contract or agreement as defined herein" (emphasis supplied). Paragraph 3(a) of Policy No. 80C223593 defines "contract" as follows: "The word, 'contract' means if in writing, a lease of premises, easement agreement, agreement required by municipal ordinance, sidetrack agreement, or elevator or escalator maintenance agreement." Thus, even coverages "B" and "D" cannot be extended by contract under the terms of policy number 80C223593.

The contractor is required to take out workmen's compensation insurance which the attached policy No. 80WH109824 purports to provide. This insurance policy appears to fulfill the requirements of Contract Document No. 72-61-185 which requires only that the employer's liability section shall not be less than \$100,000 and that the contractor be so protected from all liabilities that may be imposed under the Workmen's Compensation Act and the Workmen's Occupational Disease Act. Both of the latter are specifically covered in Item 3 of the declarations (Form L-2238, 4th Rev.) of the policy. It should be noted, however, that "this policy does not apply to liability assumed by the insured under any contract or agreement." Therefore, none of the deficiencies previously noted as to the general liability policy are herein covered.

Two other questions were posed in your request for an opinion. They ask whether or not the contractor was liable for injuries sustained by an inmate of the House of Correction working on his wood chipping operation, and if so, do the attached policies cover such liability? The general rule, of course, is that liability follows fault or negligence when it results in damage to another. If the contractor's negligence, therefore, is the proximate result of the injury to the inmate, liability will issue. The Contract also provides, however, at page 4 of the General Conditions, that the contractor shall indemnify, keep and save harmless the City, its agents and employees against all suits or claims that may be based on any injury to person or property that may occur in the course of the performance of this Contract regardless of whether the injury was caused through a negligent act or omission of the contractor, the City, or either of its employees. The conclusion is, therefore, that the contractor's liabilities are extended by the Contract insofar as inmates are concerned, although the insurance policy as previously noted would not cover such liabilities assumed by contract.

Since the doctrine which exempted both the City and its employees of liability for negligence to inmates in the past was recently (1959) abolished in an analogous case (involving school children and a school district), it would be advisable to assume that the first case coming up in the future will uphold such liability. Any such insurance should provide accordingly for this risk.

PERFORMANCE BOND

(Commissioner of Public Works—J. G. O.—February 21, 1964)

We are in receipt of your letter of February 19, 1964, which reads as follows:

"A question has been raised as to the intent of Section 107, Guarantees, of the Contract Specifications for the Lining of Chemical Storage Tanks. The specific issue is whether the 5-Year Contractor's Guarantee would have to become part of the performance bond. It is this department's position that it was never intended that the 5-Year Contractor's Guarantee would have to become part of the performance bond. Since this issue must be resolved before the Contractor, Service Painting Corporation, can undertake the work, and since bids were received on September 30, 1963, and the long delay is seriously impairing the City's

ability to complete the Central District Filtration Plant, your opinion is requested as to whether the contractor's letter dated February 12, 1964, meets the Contract Requirements. An expeditious reply will be appreciated."

Section 107 reads as follows:

"107. *Guarantees*—The Contractor shall guarantee that in the manufacture of the materials to be furnished for this work, the chemical constituents and admixtures and methods of compounding will be as specified and agreed upon. The guarantee shall provide that the installation will remain in its original condition for a period of five years after completion and acceptance of the work, and that no deterioration of any type will be evidenced during the guarantee period when exposed at or below the specified temperature to any of the chemicals listed in Section II, Service Resistance Requirements, of the Detail Specifications. The Contractor shall repair or replace, at his own expense, any and all material or material installation found faulty, defective or subject to deterioration."

Section 11—Execution of Bond, on Page A-4 reads as follows:

"11. *Execution of Bond*—The successful bidder or bidders, within thirteen (13) calendar days after acceptance of the bidders' proposal by the City, shall furnish a satisfactory performance bond in the full amount of the contract of the form 'Contractor's Performance Bond', Form P. W. O. 62, a specimen copy of which is bound in at the end of the Detail Specifications."

The specimen copy of the bond which is attached at the end of the Detail Specifications encompasses all of the contract conditions and specifications without exception and as stated in *Gridley v. Capen*, 72 Ill. 13, the definition of a "Guaranty" by text-minds, is an undertaking by one person that another shall perform his contract or fulfill his obligation, or that, if he does not, the guarantor will do it for him.

In view of the above, it is our opinion that, since the wording of Section 107 is clear, the Contractor must furnish a performance bond which covers all of the specifications including Section 107.

GENERAL BID REQUIREMENTS

(Commissioner, Department of Public Works—J. C. M.—April 14, 1964)

Under Chapter 24, Section 8-10-3 of the Illinois Revised Statutes (1963), it is provided:

"Except as otherwise herein provided, all purchase orders or contracts of whatever nature, for labor, services or work, the purchase, lease, or sale of personal property, materials, equipment or supplies, involving amounts in excess of \$2,500, made by or on behalf of any such municipality, shall be let by free and open competitive bidding after advertisement, to the lowest responsible bidder, or in the appropriate instance, to the highest responsible bidder, depending upon whether such municipality is to expend or to receive money."

Chapter 24, Section 8-10-7 of the Statutes provides the manner in which the purchasing agent shall advertise for bids.

Chapter 24, Section 8-10-10 of the Statutes provides:

"The award of any contract involving amounts in excess of \$2,500 shall be made by the purchasing agent to the lowest or highest responsible bidder as provided in Section 8-10-3. * * *. Each bid, with the name of the bidder, shall be entered on a record which record with the name of the successful bidder indicated thereon, shall, after award of contract, be open to public inspection in the office of the purchasing agent of such municipality."

Under the provisions of the Purchasing Act, the purchasing agent determines the qualifications of the bidders after said bids have been open. It is the intent of the legislature, in our opinion, that any person may make a bid. It then becomes the duty of the purchasing agent to determine who is the lowest responsible bidder.

In our opinion, if the qualifications of contractors are to be determined in advance of the advertisement for bids and the opening of bids, such procedure would be illegal.

VARIANCE FROM SPECIFICATIONS

(Purchasing Agent—F. O.—October 18, 1965)

We return herewith your file relative to the above proposed contract heretofore submitted in connection with your request for our opinion.

You ask our opinion as to the effect upon the bid of the H. H. Robertson Company where same, although low bid, has been qualified with respect to the time of performance thereof by quoting performance in 70 rather than 30 days as required by the specifications.

The pertinent facts have been indicated to be that invitations to bid were submitted to 8 contractors. Two responded, with the lowest price for the work being submitted by the H. H. Robertson Company. However, in its letter proposal, under date of September 21, 1965, the low bidder indicated that performance would be in 10 weeks.

The applicable specifications provided as follows:

"COMPLETION TIME

The Contractor shall complete the work under this contract within thirty (30) calendar days after the date of commencement of work as specified in the written notification to the Contractor from the Commissioner of Public Works or his duly authorized agent. * * *." (General Conditions, Page 8.)

"COMPLETION

"Contractor's attention is called to completion schedule as specified on Page 8 of General Conditions." (Detailed Specifications, page 1.)

"TIME OF COMMENCEMENT AND PERFORMANCE

"The time of commencement, rate of progress and time of completion are essential conditions of this contract; * * *" (General Conditions, page 2).

From an examination of the foregoing provisions, it would appear manifest that it was intended that time of completion be considered an important factor. Such interpretation could reasonably have been so construed by those

to whom bids were submitted and therefore it would be difficult to say that a 30 day performance rather than 70 days may not have discouraged bidders.

Our discussions with specification engineers of your department has revealed that time of performance can and does affect price in the work, such as increased labor costs, maintenance, etc., and in their opinion this instance would undoubtedly be the same.

In view of the fact that (1) the specifications indicate time to be of substantial significance in the performance of the proposed work; (2) that price can and is affected by the period of time within which the work is to be accomplished; (3) that there is not merely a nominal but a substantial variation in the time of performance, to-wit 40 days, is in our judgment a variance between bid and specification of a material and substantial nature and therefore the bid is invalid.

"The time of completion of a public improvement is a material part of the specifications, and a bidder has no more right to change it than to change other portions of the specifications, such as the materials to be used. *Urbany v. Carroll*, 176 Iowa 217, 157 N. W. 852." 65 A. L. R. 835, p. 847.

"In contemplation of law, a company whose bid does not conform to the advertised requirement for the doing of a public work is not a bidder." *Chicago Sanitary District v. McMahon & M. Co.*, 110 Ill. App. 510.

We think the comments of the Comptroller General of the United States, in 17 Comp. Gen. 554, 558, 559, most appropriate:

"* * * To permit public officers to accept bids not complying in substance with the advertised specifications or to permit bidders to vary their proposals after the bids are opened would soon reduce to a farce the whole procedure of letting public contracts on an open competitive basis. The strict maintenance of such procedure, required by law, is infinitely more in the public interest than obtaining an apparently pecuniary advantage in a particular case by a violation of the rules."

It is the further opinion of this department that should you desire to readvertise, there would be no legal objection thereto.

BID BONDS

(*Purchasing Agent—C. F.—November 17, 1966*)

Pursuant to your recent request, we are submitting this Department's opinion concerning the above cited bid request and your attached memorandum.

It is our opinion that under an invitation for bids which requires bidders to submit bid bonds prior to the bid opening, the bid bond requirement is a material part of the invitation which cannot be waived by contracting officers.

Therefore, noncompliance with the bid bond provision will require rejection of the bid as nonresponsive to the invitation (38 Comp. Gen. 532).

The maintenance of the integrity of the system is infinitely more in the public interest than a financial saving in an individual case (17 Comp. Gen. 554).

We suggest that a new invitation for bids on the above item should be advertised.

WITHDRAWAL OF BID

(Purchasing Agent—C. F.—December 21, 1966)

In response to your recent communication, we send you herewith this department's opinion concerning the above-cited matter.

A review of the facts show, briefly, that Sinclair, on the day following submission of its bid, and apparently the sole bid for the items involved, discovered a mistake in the price list offered and submitted a corrected price list, prior to award of the contract by the Purchasing Agent.

An inquiry by this department disclosed, also, that Specification Engineer, E. T. Joria, of the City's Purchasing Department, noted that Sinclair's price offer was lower than that submitted a year ago. Mr. Joria called this to the attention of his superiors, expressing surprise and elation over the fact, but felt it must be an error. A phone call then was made to bidder to verify his bid.

Thus, City has knowledge of the mistake and it has been held that where, after bids were opened and declared, bidder discovered error and gave prompt notice hereof and City had knowledge of error before bid was accepted, even though mistake was unilateral, knowledge by one party that offer is acting under mistake will be treated as mutual mistake (*McQuillan Municipal Corporations*, Section 29.82, Page 369; *Kemper Const. Co. v. Los Angeles*, 37 Cal. (2nd) 696, Cumulative Supplement *supra*).

Further, it has been held that where a bidder prior to award alleges a mistake in bid and requests correction of the bid and offers clear and convincing evidence of both the mistake and of the actually intended bid price, the contracting agency may determine administratively the action to be taken (39 Decisions of the Comptroller General, page 177) (Emphasis supplied).

However, the administrative action is to be taken only in those cases where action is deemed to be clearly justified; that the procedure is not to deprive bidder of the right to have the matter determined by this Department, should he so request, and this Department reserves the right to question the correctness of the final determination as to form and legality.

On the basis of the facts and law stated herein, we believe that the Purchasing Agent may chart his own course in the matter at hand without fear of being breached.

We suggest, though, that a full statement of the facts be attached hereto as a part of the permanent contract file.

Section B. EXECUTION AND INTERPRETATION

PAYMENT ON CONTRACT AFTER JUDGMENT

(Purchasing Agent, Comptroller, Commissioner, Department of Public Works—E. W. P.—June 20, 1961)

The letter attached to this letter is a fully informative transmittal setting forth in brief form the contents of the 19 Counts contained in the Complaint.

The purpose of the present letter is to advise you what, in our opinion, should be withheld from payment on Contract RF-28 with Malan Construction Corp. until the determination of this suit or unless you receive further word from us.

According to the Complaint written Notice of Claim for Lien was served by the plaintiff, Consolidated Construction Co., Inc., on your office May 9, 1961, and was followed by the service of an amended written Notice of Claim for Lien on June 13, 1961. The Complaint says that this claim is on all monies, bonds and warrants due or to become due under the contract between Malan Construction Corp. and the City of Chicago in accordance with the provisions of Chap. 82, Section 23 of the Ill. Rev. Statutes relating to Mechanics Liens on public improvements. However, the amount claimed by Consolidated Construction Co. as being due, according to the amended lien, is the sum of \$1,153,330.16. Section 23 of the Lien Act under the Statute provides for the withholding of those monies sufficient to pay the claim until the final adjudication. In the present instance the plaintiff in this action has made the City of Chicago a nominal party to this suit and has not served the City with a certified copy of the Complaint filed against the Contractor, as provided by statute.

However, it is our opinion that the amount of \$1,153,330.16 should be withheld in order to satisfy the statutory provisions from payment on Contract RF-28. We understand that there is more than this amount due or to become due on this contract of the City with Malan, but our only obligation is to withhold the amount claimed by the statutory lien.

PRICE BASIS FOR CHANGE ORDER

(Purchasing Agent—J. G. O.—July 14, 1961)

We are in receipt of Commissioner DeMent's letter of June 13, 1961, in which he requested your reconsideration of his previous request for the issuance of a Change Order increasing the subject contract by \$37,435.50.

Attached to Commissioner DeMent's letter was a letter dated June 1, 1961, which was written to the Commissioner by Martin Crane, attorney for Hazelet & Erdal, in which Mr. Crane pointed out that the subject contract was never actually or legally terminated and that \$8,280,000.00 was the "approved estimated cost" and that this figure was the proper basis to be used in determining the compensation due Hazelet & Erdal.

Mr. Crane also recited, in part, as follows:

"Meetings were held April 18 and 19, 1960, in your office with you, representatives of the State Highway Department, representatives of

the Bureau of Public Roads and Messrs. Sanders and Reickert of Hazelet & Erdal, at which time it was agreed that for work done on the bascule bridge its value for contract settlement purposes should be considered as \$8,280,000.00 and that Hazelet & Erdal's work was 28.2% completed. Using these figures and the contract rate of 5%, the fee for work done on the bascule bridge was then computed at 28.2% of 5% of \$8,280,000.00 or \$116,748.00. Of this sum \$37,435.50 is due and remains unpaid. These agreements were incorporated in Hazelet & Erdal's letter of April 19, 1960, to you wherein they not only set forth the basis of settlement for work on the bascule bridge, but set forth the terms on which they would continue the work and design a high level fixed bridge for a fee of 4% of the contract construction cost. Your letter of April 20, 1960, to them approved these proposals."

There is no formula in the contract between the City and Hazelet & Erdal for the determination of the amount of compensation due the contractor in the event the agreement be terminated or materially changed in scope.

Hence, any additional payment to the contractor, in our opinion, could only be made on a "quantum meruit basis" giving due consideration to what would be a fair compensation to the contractor and further giving due consideration to what would be a fair and reasonable compensation to the contractor for the design of the fixed bridge. We assume that this was the basis of the proposed agreement with the contractor which has been recommended to you by Commissioner DeMent after he held conferences with representatives of the contractor, the State Highway Department and the Bureau of Public Roads.

In view of the foregoing, we approve the issuance of the Change Order increasing the compensation under the subject contract by \$37,435.50 and further authorize the continuance of work under the subject contract for the design of a high level fixed bridge for a fee of 4% of the contract construction cost, subject, however, to your approval of the reasonableness of the fees.

EXTENSION OF TIME FOR PERFORMANCE

(Purchasing Agent—J. G. O.—July 21, 1961)

We are in receipt of your letter of July 10, 1961, concerning the subject contract, in which Commissioner DeMent approves and concurs in the recommendation of Naess & Murphy, the consulting engineers, that the contractor be granted a 26 day extension of time under the subject contract.

Commissioner DeMent advises us as follows:

"The contractor requests a 39 day extension of time, a portion of which is the result of revisions to wall footings from that originally shown on the contract drawings. Naes & Murphy, Architects-Engineers have analyzed this request and recommend a 12 day time extension for this item since the elapsed time between the initiation of this change and the consummation of construction, involved in this change, amounted to twelve days.

Additionally this contractors' 39 day extension of time request is in part based upon delays experienced as the result of revisions to the contract drawings. These include the addition of cast iron piping, rodout and blow-down basins, complete grounding systems for the Terminal Buildings, 170 steel anchor plates, 32 wall sleeves, door frames, excavation and structural concrete for widening the tunnel walls at the ends of the buildings. Naess & Murphy have reviewed these items and recommend a 14 day extension of time be allowed for this work.

This contractor requests a 13 day extension of time because of the delay in obtaining access to the extreme west end of the area acquired for his construction work. Naess & Murphy recommend that no time extension be granted for this item because only an incidental portion of the contract was affected.

Transmitted herewith is a copy of Naess & Murphy's analysis of this contractors' requests.

Naess & Murphy's recommended extension will, if granted, make the revised time of completion September 4, 1960. We concur in this recommendation."

The question of an extension of time is one that is moot for all practical purposes inasmuch as liquidated damages may not legally be assessed against the contractor for the following reasons:

1. The contract was materially changed in scope as is also set forth in Commissioner's letter referred to above and there is no indication that the consultants, Naess & Murphy, negotiated any extension of time at the time the contractor was required to do the extra work.

2. There is no evidence that the consultants, on behalf of the Commissioner, have complied with Section GC125 Time Schedule B "If the Time Schedule is not being met, the Contractor when ordered by the Commissioner in writing shall increase within ninety-six (96) hours his working forces by employing for each calendar day, including Saturdays, Sundays and Holidays, such complete additional working shifts as the Commissioner in his discretion deems necessary."

In view of the above, if our assumptions are correct, any liquidated damages have either been waived by the City or have been otherwise rendered ineffective legally and the Contractor is entitled to an extension of time to the actual completion date of the contract.

LIQUIDATED DAMAGES

(Chief Engineer, Bureau of Engineering, Department of Public Works—C. F. V.—November 28, 1961)

Your letter of October 26, requests our opinion concerning interpretation of pertinent clauses in the above cited contract relative to assessment of liquidated damages by reason of contractor's exceeding the specified completion date by 99 days.

Your letter states that although contractor was directed to commence work on November 1, 1960, your records indicate "contractor's first productive work was not started until January 5, 1961, 66 days after the theoretical starting date . . ."; such "productive work" was commenced apparently in response to your direction to contractor dated December 29, 1960 "to prosecute this work with all due diligence so as to complete it within the specified time", namely, July 9, 1961—theoretical completion date established by the contract, computed as 250 calendar days from the date established to commence work (November 1, 1960).

Your letter further indicates that on March 6, 1961, contractor was directed to work three shifts a day in that only 1.2% of the work had been completed by February 28, 1961 whereas 47.6% should have been completed by that date. Contractor's request for a 60 day extension of time, dated June 6, was not recommended by your department to the Purchasing Agent as indicated by your letter to contractor dated June 20, 1961.

Reference is made to the section entitled Time and Progress (Part I, p. 5) and the section entitled Unavoidable Delays (section 117, Part II, pp. 6-7) as controlling the issues. The former recites, among other things, that time is of the essence of the contract, that "contractor agrees to begin actual work" in conformity with the notice from the commissioner as provided in a prior section; the latter recites how, when, and for what reasons extensions of time will be granted.

We believe that these sections must be read in conjunction with all provisions of the specification and that the following items are also pertinent:

1) *Section 116, Time and Progress, Part II, p. 6* which provides for submission of a time schedule by contractor to the commissioner within 10 days of the effective date of the contract showing proposed rate of progress by contractor insuring timely completion of the work.

2) *Section 117, Unavoidable Delays, hereinabove referred to, the last paragraph of which provides as follows:*

"The time of commencement, rate of progress and time of completion are essential conditions of this contract; however, if the time, of performance of the contract is for any reason, either expressly or *by implication*, extended, such extension shall not affect the validity of this contract," etc. (emphasis supplied).

3) *Section 122, Default of Contract, Part II, p. 9* providing that

"The contractor agrees to prosecute the work with such force as the commissioner shall deem necessary to its completion within the time specified, and to carry on said work under the immediate direction and superintendence of said commissioner—and, in case of failure by the Contractor to comply with this contract in any manner, then the Purchasing Agent may declare the same forfeited, either as to a portion or the whole thereof, and to relet—".

4) *Section 7.25, No Waiver of Legal Rights, P. 36, Standard Specifications of Road and Bridge Construction, providing that*

"Neither the acceptance by the Department, or any representative of the Department . . . shall operate as a waiver of any portion of the contract, or of any power herein reserved, or any right to damage herein provided. A waiver of any breach of the contract shall not be held to be a waiver of any other or subsequent breach."

5) *Section 205.1, Field Offices etc., Part II, p. 15* providing that

"The Contractor shall provide a suitable field office for the exclusive use of the commissioner and his representatives at a location conveniently close to that part of the work being constructed."

Whether or not, and in what amounts liquidated damages should be assessed against contractor may be controlled by acts not contained in your letter. Although the contract makes time of performance "of the essence" certain equities may be implied by the circumstances.

Specifically, we are unable to determine:

- a) Why contractor failed to commence work on November 1,
- b) Whether contractor submitted a work progress time schedule in accordance with specifications,
- c) If so, was contractor's progress on the job in conformity with said schedule from November 1, 1960 to February 28, 1961,
- d) Whether informal representations were made to contractor that the time of performance would be extended thus permitting contractor's conten-

tion that the time of commencement or completion was extended "by implication" under the last paragraph of section 117,

e) Whether, in your opinion, it was theoretically possible to complete the work by July 9, 1961 if contractor had proceeded diligently with the work starting on a) December 30, 1960, and b) March 1, 1961?—Thus relieving City of a possible contention that use of forfeiture provisions by the City at those dates would have avoided or reduced the damages now sought.

Since the contract calls for a field office for use by the City, and for an approved work progress time schedule, it is presumed that the City was aware of Contractor's failure to commence work on time, and his failure to proceed diligently. The contractor's actions (or lack thereof) up to the time of your December 29 notice constituted a breach of the contract.

The City's notice to proceed constituted an election on the part of the City to waive that breach, and to waive its right at that time to avail itself of the forfeiture provisions. Such waiver, however, by express terms (Section 7.25 of SSRBC) does not necessarily preclude recovery of damages for late completion. See *Snell v. Cottingham*, 72 Ill. 161 and *Paddock v. Stout*, 121 Ill. 571.

We shall presume hereafter that no informal representations extending either the time of commencement or the time of completion were given by the City's resident engineer, that contractor's failure to commence on time was deliberate and inexcusable, and that questions set forth above at (a) through (e) are resolved unfavorably to contractor.

Founded on these presumptions, it is our opinion that liquidated damages may be assessed, and may be set off against money reserved, in the amount of \$500 per day for each day of late performance. Actual damages, by the nature of the contract, elude precision; the per diem amount was stipulated prior to execution of the contract and is not in our judgment unreasonable, extortionate or oppressive in view of the subject project: underlying this judgment is our presumption that the established sum of \$500 was calculated to forecast and pre-estimate probable per diem damages, and not to penalize contractor for late performance. The special circumstances, and difficulty in proving compensable damages upon which are based valuation for liquidated damages are clearly indicated in the third paragraph of the section entitled Time and Progress, p. 6, Part I as follows:

"The work under this contract is necessary in order to proceed with the filling of the West arm of the South Fork of the South branch of the Chicago River. Any delay in the completion of this project will materially interrupt the scheduling of other City construction work at this site thereby causing great inconvenience to the public, added cost of engineering and supervision, maintenance of temporary facilities and other tangible and intangible losses.—"

Timely completion of the project affects the public convenience; contracts of this type entered by the City of Chicago, being a municipal corporation, involve directly the public benefit. Damage to the public convenience and benefit are compensable but are not amenable to accurate measurement or probative valuation in money (See *Manufacturer's Casualty Ins. Co. v. Sho-Mc Power Corp.*, 157 Fed. Supp. 681).

The intent of the liquidated damage provisions that the stipulated amount shall be as measurement of damage, and not as a penalty, is express. It appears, therefore, that the principal criteria for an enforceable liquidated damage clause are present: Intent, reasonableness and uncertainty (See, generally, *Parker-Washington Co. v. City of Chicago*, 267 Ill. 136).

Predicated on the information contained in your letter, and subject to the foregoing considerations, it is our opinion that liquidated damage provisions of the subject contract may be invoked. We suggest that the matter be referred to the Purchasing Agent for his consideration.

CONTRACT INTERPRETATION

(Purchasing Agent—C. F. V.—January 4, 1962)

Your letters of December 12 and December 21 request our opinion concerning interpretation of clauses relating to Temporary Heating in the above cited specifications.

The clause in the contract covering the "General Work" which was awarded separately to Best Way Construction Co., Inc., reads as follows:

TEMPORARY HEATING

"This contractor shall provide and pay for all expense connected with the temporary heating of the building which may be necessary for the drying of plastering or to facilitate the construction of work within the shortest possible time. This contractor shall be responsible to the heating contractor for any use of or any damage to the heating apparatus of the building before final acceptance thereof."

The clause in the contract covering the Heating, Ventilation and Air Conditioning system which was awarded as a separate contract to Acme Temperature Control reads as follows:

TEMPORARY HEAT

"The General Contractor will provide temporary heat until such time as boiler and firing equipment becomes operative. This Contractor shall provide temporary heat as soon as new system becomes operative. Temporary heat shall include furnishing of all necessary valves, piping and temporary heating units to provide and maintain a minimum temperature of 60 degrees in all areas under construction. Cost of all fuel for operation of the temporary heating system from new boiler will be paid for by others. Temporary heat will be required until building is completely finished and accepted by owner."

We are asked to determine who is liable for the cost of temporary heating under the specifications in view of these two clauses in the separately awarded contracts.

Although the specifications contain a description of requirements for the entire construction project with all appurtenant systems included, bids were invited on each separate system—"General [construction] Work", "Plumbing", "Heating, Ventilating and Air Conditioning", and "Electrical Work"—as well as on the entire project. However, contracts were separately awarded for each system, and therefore, each contract must be amenable to interpretation standing alone, even though all four are bound in one booklet. Notwithstanding the above, an ambiguity, if it exists in one contract, may be resolved by reference to another contract in view of the cooperative nature of the project, the several statements in the specifications relating to other contractors on the job, and the general description of the entire project, with all its systems, including under "Scope of Work" for the contract covering the "General Work" on page G1 of "Detailed Specifications".

Each of the two contracts under purview specify duties owed the City, and, standing alone, present no ambiguity. Best Way is the contractor for the "General Work", not the general contractor in the ordinary sense of that appellation.

One of Best Way's duties, as indicated by the clause above quoted, is "to provide and pay for all expense connected with the temporary heating of the building * * *". Temporary heat therein referred to is for two purposes,

as the clause continues, "which may be necessary for the drying of plastering or to facilitate construction of work within the shortest possible time". The clause is unequivocal as relates to this contractor's duty to provide temporary heat. Since this clause is contained under the section of the contract covering "General Work", the providing of temporary heating by this contractor should be interpreted to extend for the benefit of all contractors working on the project, not just the contractor for the general work. This conclusion is evident from a perusal of other duties which this contractor undertakes by the "General Work" section, e.g., providing a watchman, providing temporary lighting and power and toilet facilities.

It should be noted that the contractor for the "General Work" undertakes to provide heating, not at a particular minimum degree of intensity, but only as may be necessary for the drying of plastering and to facilitate the construction * * *. This is a question of fact, but should be interpreted to extend to the prevention of deterioration of work completed—not only the work done by the contractor for the "General Work", but also work completed by the other contractors.

It is significant that the method by which temporary heat will be supplied is unspecified. This contractor may choose whatever method or apparatus is most practical and efficient. However, the allusion to his responsibilities of indemnity "to the heating contractor for any use of or damage to the heating apparatus" implies that the heating apparatus to be installed by heating contractor will or may be used. The words "for any use of" reaffirms Best Way's contractual duty to "provide and pay for all expense connected with temporary heating" articulated in the first sentence of the section.

Thus, it becomes evident that the contract for "General Work" is unequivocal regarding this contractor's duty to provide and pay for temporary heating. Resort need not be made to extrinsic documents to construe the clause. Contractor is not relieved of this duty by seeking to interpose the duty of another contractor under some other document which cannot impose duties on Best Way in that Best Way is not a party to that other agreement.

It is our opinion, therefore, that Best Way Construction Co., Inc. must bear all expenses of temporary heating under the specifications.

Any ambiguity which may superficially appear to exist between the two clauses of the two contracts is cured by the definition of "temporary heat" given within the clause of Acme's contract: "Temporary heat shall include furnishing of all necessary valves, piping and temporary heating units to provide and maintain a minimum temperature of 60 degrees in all areas under construction". The definition relates only to the apparatus whereby heat is to be provided. The apparent implication is that Best Way which is, under its contract, responsible for temporary heating may utilize the building's heating facilities once said equipment becomes operative.

CUBIC YARD AS UNIT BASIS

(Purchasing Agent—R. L. H.—March 16, 1962)

Returned herewith in triplicate pursuant to your recent request is Part 1 of the above cited contract No. 23036.

Our examination of Part 1 and the addenda thereto attached caused us to also examine Part 2 wherein a discrepancy was found in regard to *Item 25-Portland Cement Base Course*. It appears that the Detail Specifications for this item, on pages G-82 through G-84, provides for measurement and payment to be on a per cubic yard unit basis although the customary and usual basis in the trade is per square yard. The cubic yard is used when materials only

are being purchased but square yard is the general unit when construction of the course including materials and labor is required.

Addendum 3 of February 14, 1962, paragraph 4, changes the bid request on the proposal page from cubic yard to square yard to conform to trade custom and usage but no change was made in the detail specifications herein referred to.

It is our opinion that the bidder interpreted the effect of the Addendum to not only correct the item on the proposal page but also to correct the specifications to conform to trade custom and usage and therefore expects all measurement and payment to be made on the square yard basis as bid.

A letter from the contractor herein setting forth that his bid was predicated by the foregoing interpretation should be obtained in triplicate and bound in each copy of the contract.

Subject to the foregoing, it is our opinion that when signed by the Purchasing Agent, the City Comptroller and the Mayor, this will be a valid and binding contract.

Our approval as to legality and form is indicated thereon.

CONTRACTOR'S LIABILITY FOR INSPECTION

(Commissioner of Public Works—C. F. V.—March 21, 1962)

Your letter of January 22 requests our opinion regarding electrical contractors' liability for the City's electrical inspection fees for jobs at O'Hare Airport. Transmitted with your letter is that of Hyre Electric Company, dated January 15, wherein that contractor disclaims such liability under the terms of certain undesignated City construction contracts at the airport. Hyre's letter indicated that that firm acts both as prime and subcontractor under these agreements.

For the sake of example herein, contract RB-16 will be considered. We are informed that Hyre Electric Company was subcontractor for the electrical work thereof. This contract is for construction of the Terminal Concourse Building which is used to shelter lessee airlines administrative offices and counters for passenger service. The land and building thereon are, of course, owned by the City.

The specifications state on page 3403 of Part II that contractor shall "obtain and pay for all necessary permits and certificates of inspection which may be required in connection with the electrical work". The contract, therefore, clearly requires payment of electrical inspection and permit fees that are legally assessable. Hyre Electrical Company does not dispute this premise.

The dispute concerns legality of the assessment and contractor's contention is based upon his interpretation of the Municipal Code and enabling statute. Contractor asserts that the definition of "electrical equipment" in the Code and Statute excludes assessment for the subject equipment because said equipment is installed for the use of common carriers, i.e., lessee airline.

Permit fees under Chapter 86 of the Municipal Code, are assessed for the inspection of electrical equipment, Section 10 of that ordinance provides:

The term "electrical equipment" as used in the electrical regulations of this code is hereby defined as meaning conductors and equipment installed for the utilization of electricity supplied for light, heat or power, and signal light, heat, or power, not including radio apparatus or equipment for wireless reception of sounds and signals and does not include apparatus, conductors, and other equipment installed for or by

public utilities, including common carriers, which are under the jurisdiction of the Illinois Commerce Commission for use in their operation as public utilities.

Chapter 24, Section 11-37-1 (Ill. Rev. Stat., 1961), the Illinois enabling statute, defines the term in substantially the same language.

It is our opinion that the subject fees are legally assessable under the Municipal Code and enabling statutes. The purpose of the regulations is to prevent fire and shock hazards from faulty installation of electrical equipment. Effecting this purpose is clearly within the City's police power.

To qualify for the express exemption from inspection and fees, electrical equipment of common carriers, subject to jurisdiction of the I. C. C., must be "for use in their operation as public utilities". We believe that the electrical system for light, heat, power or signals, within the building leased by an airline at O'Hare is not for use by airline in its operation as a common carrier *per se*, and that therefore, the exemption was not intended to extend to such equipment. We judge that the legislature in its definition of the term "electrical equipment" contemplated a distinction between the equipment process, such as an electrical system within an aircraft itself. The Illinois Public Utilities Act does not withdraw from municipalities their authority to impose local police regulations affecting the health and welfare of inhabitants.

See: *City of Chicago v. Alton R. R. Co.*, 355 Ill. 64 (1934)

21 *Opinions of the Corporation Counsel and Assistants*, No. 10308, p. 214.

We would further point out that the subject contract is not with the airline but with the City; that the installation of equipment is for the City and that the building and real estate are owned by the City.

In view of the foregoing, the contractor under contract RB 16, and under other contracts similarly drawn involving similar electrical equipment, is not immune from the disputed fees.

EMPLOYMENT PREFERENCE

(*Commissioner, Department of Public Works—R. L. H.—March 23, 1962*)

Returned herewith pursuant to your recent request are Parts 1 and 2 of the above cited contract.

Please be advised that we find nothing legally objectionable therein, but do recommend the inclusion of the following two clauses in the contract. The first clause relating to *Taxes* is to supersede the present clause on Page 3 of Part 1 and the second clause relating to *Employment Preference* as a requirement of State Statute on all Public Works Contracts.

TAXES

Federal Excise Tax does not apply to materials or services purchased by the City of Chicago. The prices quoted herein shall be deemed to include all other direct and/or indirect Federal, State and local taxes which apply.

The prices quoted herein shall comply with all Federal Laws and Regulations.

Contractor agrees to submit to the City Comptroller a statement setting forth an accurate estimate of the amount of the bid price attributable to any Illinois State and/or Municipal or County Retailers' and/or Service Occupation Taxes and/or Use and/or Service Use Taxes which may have been applicable to the proceeds of the purchase by contractor or its subcontractors of materials to be sold or transferred to the City in the construction contemplated by this contract. In this regard, contractor and its subcontractors shall wherever practicable require separate statement of such applicable taxes in the purchase of materials from suppliers. The statement of estimated tax hereinabove referred to shall be submitted as soon as practicable after purchase of all materials by contractor and its subcontractors, but in no case later than final payment under the contract. City Comptroller may in his discretion withhold final payments until such statement is received.

In the event that contractor, its subcontractors, or suppliers of either for any reason become eligible for a full or partial credit or refund, or are relieved from payment, of any tax included in the bid price, contractor agrees to repay such amounts in cash to the City in accordance with directions therefor by the City, regardless of to whom eligibility to file such a claim accrues.

In the event that during the term of this contract a reduction of the rate of any applicable tax becomes effective, or that during the term of the contract any included tax becomes inapplicable, contractor agrees to reduce its bid price accordingly.

EMPLOYMENT PREFERENCE:

The Contractor shall comply with "An Act to give preference to the veterans of the United States military and naval service in appointments and employment upon public works, by, or for the use of, the State or its political subdivisions," passed by the 59th General Assembly and approved on June 12, 1935.

The Contractor will not be required to give preference to veterans who are not residents of the City of Chicago over residents thereof who are not veterans.

The Contractor shall employ only Illinois laborers on work under this contract, provided that other laborers may be used when Illinois laborers are not available or are incapable of performing the particular type of work involved, all as provided in an act entitled "An Act to give preference in the construction of public work projects and improvements to citizens of the United States who have resided in Illinois for one year," filed July 26, 1939.

NON-DISCRIMINATION CLAUSE

(Purchasing Agent—R. L. H.—May 2, 1962)

Returned herewith in triplicate pursuant to your recent request is Part 1 of the above cited contract No. 23198.

It is suggested that in future contracts the following changes be made:

- 1) Add to Section No. IB 18:

If afterward of contract, questions arise concerning interpretation of contract documents, it is understood that the decision of the Purchasing Agent will be final and binding.

- 2) Change Section No. GC 101 (c) to read:

If the provisions of any City Ordinance conflicts with the provisions of Article 8, Division 10 of the Illinois Municipal Code entitled

"The Municipal Purchasing Act for Cities of 500,000 or more Population", approved August 24, 1961 as part of Chapter 24, Illinois Revised Statutes 1961, the State Statute shall govern.

3) Combine Section GC 102 with GC 130 in a form similar to:

GC 102 NON-DISCRIMINATION AND FAIR EMPLOYMENT:

The Contractor, its subcontractors, if any, and all labor organizations furnishing skilled, unskilled, and craft union skilled labor, or who may perform any labor or services in performing under this contract shall not discriminate against any worker, employee or applicant for employment because of race, creed, color or national origin. The Contractor further agrees that each sub-contract, if any, made under this contract will contain a similar provision with respect to non-discrimination. The Contractor's attention is called to the State Acts approved July 8, 1933 (Ch. 29, Secs. 17 to 24 inclusive, Ill. Rev. Stats. 1961) and July 21, 1961 (Ch. 48, Secs. 851 to 866 inclusive, Ill. Rev. Stats. 1961) and to an ordinance passed by the City Council of the City of Chicago, August 21, 1945, page 3877 of the Journal of the Proceedings of the City Council.

It is assumed that there is nothing in the other Parts of this contract which will affect its legality.

Subject to your obtaining the requisite resolution of the Board of Directors is set forth in Section IB 7 (c), it is our opinion that when signed by the Purchasing Agent, the City Comptroller and the Mayor, this will be a valid and binding contract.

Our approval as to form and legality has been indicated thereon.

"MAINTENANCE"

(Commissioner of Public Works—C. F. V.—May 9, 1962)

Your letter of February 27, 1962, supplementing that of December 20, 1961, requests our interpretation of the above cited contract in relation to contractor's claims for:

1) expenses amounting to \$7,126.00 for labor required to set anchor bolts for the railroad structure, and

2) expenses amounting to \$71,536.00 purportedly incurred during or on account of an approved 152-day time extension.

1. It is our understanding that contractor predicates his claim at (1) above on the terms of the contract for furnishing and erecting structural steel on the same project. The specifications originally were drawn to include all phase of construction of the bridge. The specifications were later split into three separate contracts; one of these was let to Paschen Contractors, Inc. under item 30 of which Paschen was to lay specified concrete; another of these was let to U. S. Steel by the terms of which U. S. Steel agreed to furnish and erect certain structural steel. Under the original specifications, Item 32 covered the furnishing and erecting of all structural steel needed for the entire project, and included anchor bolts within the descriptive definition of structural steel.

The separate contract for structural steel work incorporates Item 32 of the original specifications, but addendum No. 1 of that contract amends said item 32 by adding the following:

"The structural steel to be furnished and erected under this item consists only of the structural steel required for the steel superstructures,

above the concrete bridge seats of the piers and abutments, for the bridges for the C. & N. W. Ry. Tracks * * *. Any structural steel required in sub-structure work is not included in the work under this contract."

Paschen's contention, as we understand it, is that item 32 of the original specifications was intended to cover labor cost in setting anchor bolts by virtue of the inclusion of anchor bolts within the definition of structural steel in Item 32. From the addendum quoted above, it is apparent that anchor bolt setting was not included under the steel contract inasmuch as the anchor bolts are set in the concrete piers erected by Paschen. Said piers are expressly excluded by the addendum.

On the other hand, Paschen's contract incorporates Item 30 of the original specifications. Item 30 describes the work to be done by Paschen in furnishing and placing Class X Concrete in the railroad substructure. The last paragraph on page J-53 specifies that "anchor bolt assemblies for the railroad structure shall be accurately set in templates and concreted into place". The contract does not say that this work—setting and concreting the bolts—is to be done by another contractor. The described work appears in the section of work to be done by Paschen. Since the bolts must be set in the concrete piers, the express terms as well as logic indicate that Paschen shall bear the cost of setting these bolts. The cost of setting these bolts is not later expressly or impliedly excluded.

It is our opinion that the labor for setting the subject anchor bolts was included within the work to be done by Paschen and that Paschen's bid must have contemplated this cost under Basis of Payment (p. J-54): "This work will be paid for at the contract unit price per cubic yard for Class X Concrete, measured as herein specified."

Contractor may not interpose another contract, not his own, to interpret his own contract where no ambiguity exists in his own contract. We find no ambiguity and reject contractor's assertion, in his letter of October 5, 1959, that the subject labor was to be paid for under the contract for structural steel. Contractor's claim for \$7,126.00 should therefore be rejected.

2. Expenses claimed by contractor for (2) above were itemized in his letter dated December 20, 1960, and include extra costs for labor, electricity, telephone and equipment rental. This claim is predicated on section 24 of "Special Provisions", as revised by item (7) of the "Supplemental Specifications" applicable only to this contractor. The "Supplemental Specifications" substitute the first two paragraphs of section 24 of the "Special Provisions" with two new paragraphs, leaving the last three paragraphs unchanged.

It is our understanding that an extension of time was given this contractor because its work, contingent on that of the U. S. Steel (the structural steel contractor), was delayed by reason of the U. S. Steel's delay. U. S. Steel was granted an extension because of the contemporaneous strike. Extra compensation for most delays would be denied under the third and fourth paragraphs of section 24, but we believe that this type of delay is contemplated by the provisions of the second paragraph of section 24 as revised and thus compensable in accordance therewith.

Said paragraph (2) provides that:

"* * * if, in the opinion of the Commissioner [of Public Works] and Purchasing Agent, failure to complete the aforesaid trestle work, track work or structural steel work, as specified above, constitutes or causes a delay in the commencement of prosecution of the work under this contract, then the time for completion of the entire work under this contract will be extended *and the contractor will be compensated for extra premiums paid by him on his bond and insurance and for salaries and wages of the employees and other extra expenses of the contractor that in the opinion of the Commissioner and Purchasing Agent are neces-*

sary only for the proper maintenance of the work and of the materials and equipment of the Contractor during or on account only of such delay. * * * and the contractor agrees that he shall not be entitled to any damages or additional compensation from the City on account of such delay." (Emphasis supplied.)

It is our opinion that the word "maintenance", as used in context, was not intended to include contractor's costs for equipment rental. The term "maintenance" has a wide spectrum of definition; it must be read in context to discover the real intention of the parties. Equipment rental here is in the nature of a capital, not a maintenance, expense; in this respect it is similar to an owner's acquisition costs. To recognize a claim for rental costs would equate the term "maintenance", where equipment is rented, to the term "provide" such equipment. Manifestly, equipment when not used during a period of delay need not be provided. Although the word "maintain" in a given context may mean "provide", we believe that here, the expression "maintenance of equipment" was intended to include only those costs which are necessary to preserve the equipment from deterioration by the elements, or other expenses necessary to keep it in operation efficiently during the period of delay. Neither the City nor contractor had caused the delay here. The fortuitous combination of events should not extend the parties' intention beyond contemplated limits.

In the case of *Herlihy Mid-Continent Co. v. Sanitary District of Chicago* (322 Ill. App. 692, affd. in part and revsd. in part 390 Ill. 160, 1945), the court considered a clause of the contract between the parties which limited damages caused by delay. The limitation in said clause was phrased in substantially the same language as that quoted above from the contract now under purview. Relying on the *Underground Construction Co. v. Sanitary District of Chicago* (367 Ill. 360, 1936), the court found that such damages may be limited by contract, and disallowed plaintiff's claim for *additional office overhead, equipment rental*, increased cost of material and other items. The trial court's "Conclusions of Law", ultimately affirmed, found that these claims were items of damage excluded by the clause in question (37 C 8505).

Therefore, whereas equipment rental may be allowable and, indeed, has been allowed, as an item of damages caused by delay when the contract is silent on the point, it is not an element of maintenance of equipment. Damages resulting from this type of delay are expressly waived by the contract terms.

In view of the foregoing, we submit that the category of claimed expense for "Equipment Rental", and "office help" under the category "Labor" should not be considered by the Commissioner and Purchasing Agent in determining extra expenses incurred by contractor.

On the other hand, the other categories of items listed in contractor's letter of December 20, 1960—namely labor (except "office help") telephone, electricity, etc.—are either expressly covered, or are, we believe, contemplated by the language "other expenses * * * necessary only for maintenance of the work and of material * * *". Whether the amounts claimed are necessary is a problem for audit and decision by the Commissioner and Purchasing Agent.

We return herewith copies of the contract documents transmitted with your letter of December 20, 1961, and contractor's progress chart transmitted with your letter of February 27, 1962.

NECESSITY FOR A CHANGE ORDER

(First Deputy Comptroller—J. C. M.—August 24, 1962)

In your letter dated August 23, 1962 you refer to the bonus paid to Malan Construction Company under Chicago-O'Hare Field contract No. 21832 and request an opinion as to whether you need a Change Order.

As referred to in your letter, we did advise the Department of Public Works verbally that a change order was not necessary because the bonus and penalty provisions were a part of the contract, and the determination thereof was purely a matter of computation.

You state that we issued prior opinions contrary to the above. The opinion you refer to is probably the opinion dated July 23, 1957 (Vol. 24, Opinions of Corporation Counsel, pp. 711-712). In that opinion, we quoted the standard phrase in the City contracts. The opinion referred to an increase in the contract price, based upon the need for a greater number of materials having a unit price, and the contract amount being increased accordingly. In the contract in question there is no change in the contract provisions or price; they are determinable by performance. Therefore, there is no need for a change order. A change order relates to additions or subtractions of labor and material over or under estimates provided for in the contract. The bonus for completion prior to the fixed completion date is provided for in the contract and, as stated above, is simply a matter of computation.

IMPLIED CONTRACTS

(Commissioner of Aviation—R. L. H.—October 4, 1962)

We are in receipt of your recent letter requesting an opinion in the above cited matter, attached thereto being a copy of the contract between Airport Sales and the City and a letter from Airport Sales advising of the discontinuance of operations.

The contract submitted was for a three-year period which expired at the end of 1956, with neither a provision for renewal of same or a formal written renewal executed thereafter. We therefore find that Airport Sales was operating at Midway from the end of 1956 until they discontinued operations in July, 1962 without an express contract.

The question is then raised as to whether an implied contract was in existence during this period and if so, what the terms and conditions were. The Law is quite settled as to the definition of an implied contract as can be seen from the multitude of cases referred to in both 12 American Jurisprudence and 17 Corpus Juris Secundum under *Contracts*, paragraph 4, appearing on pages 498 and 317 and pages following respectively, to-wit:

An implied contract arises where the intention of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts, or, where there are circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intent to contract.

At the expiration of the contract at the end of 1956 there no longer was an express statement of the intention of the parties. However, from that date to the July 10, 1962, letter, the parties to that express contract have by their

conduct indicated that it was their intentions that all of the terms and conditions thereof were still in force. This then is an implied contract which indicates a mutual intent of both parties to contract on the same terms and conditions as that set forth previously in the express contract.

Insofar as the minimum annual rental of \$17,500.00 is concerned, it was also the mutual intent of the parties that the payment terms of the express contract should continue. This is evidenced by payment by Airport Sales of the exact minimum for the calendar year 1961. There being no mutuality of consent to modify these terms, evidenced by your inquiry, it is our opinion that by virtue of the implied contract, Airport Sales Corporation is bound by the "rental" terms until the date of their vacation of the premises.

Therefore, Airport Sales Corporation can be held to pay the pro-rata share of the \$17,500.00 annual minimum for that part of 1962 they were in occupancy.

MISTAKE ON FACE

(Purchasing Agent—J. G. O.—January 15, 1963)

We are in receipt of your letter of January 10, 1963, in which you advise as follows:

"Opposite item 5-62, page C-2 of Exhibit A, a figure of \$15,000.00 was inserted by the bidder.

Opposite the same item of Exhibit B, a figure of \$15,000.00 was inserted by the bidder.

Opposite the same item of Exhibit C, a modified figure of \$14,000.00 was inserted by the bidder."

Since the bid is in triplicate, you ask which Exhibit may be accepted as representing the actual bid offer.

Parcel 5-62 is one of the parcels listed under Redevelopment Project North-LaSalle in the bid document and there is a total shown for the Redevelopment Project North-LaSalle in Exhibits A, B and C and that total in each instance is \$19,900.00.

It is a fundamental rule of law that where there is an obvious mistake made on the face of an instrument, which is corrected by other expressions therein, then the whole instrument is to be considered and construed according to the evident intent of the parties as manifested by all the language used. Hence, it was clearly the intent of the bidder that the amount opposite Item 5-62 should be \$14,000.00.

JUSTIFICATION NECESSARY FOR CHANGE ORDER

(Purchasing Agent—J. G. O.—May 8, 1963)

We are in receipt of a letter addressed to you by Commissioner DeMent dated April 18, 1963, in which the Commissioner recommends the issuance of a Change Order increasing the subject contract by \$10,234.00.

Commissioner DeMent's letter recites in part as follows:

"This change order provides a unit price adjustment to \$0.40 per square foot for Bid Item No. 121—Sand Blasting. The original bid for this item was \$0.20 per square foot, for the sand blasting of certain ex-

posed concrete structures in the vicinity of the entrance to the parking lot. The intent of this work was to remove the surface mortar of the exposed formed surfaces to reveal the special colored aggregate utilized in the concrete. Although the laboratory cast and sand blasted samples were referenced in the specifications, it was not specified that the work would be required to match the samples.

Therefore, when the number of passes required with the sandblast nozzle was resolved, to obtain the aggregate exposure acceptable, a meeting was held to determine the adjustment or allowance for work considered to be beyond the scope of the contract requirements. Since no specific agreement could be reached, it was decided that all time and materials would be checked and approved by the Architects—Engineers for later resolution at the conclusion of the job.

Prior to advertisement of Contract RB-20, checking of various sources by C. F. Murphy Associates for this work, revealed a cost of \$0.40 to \$0.50 per square foot, could be anticipated. The original bid unit price was \$0.20 per square foot, as noted in the foregoing."

We have reviewed the specifications and particularly Item No. 121 on pages 9-17 titled "Sand Blasting" which is as follows:

"Item No. 121. *Sand Blasting*. This item will be paid for at the contract unit price per square foot. The total number of square feet of the retaining walls as sand blasted with approved material and washed with a muriatic acid solution will be counted for payment. Such payment will be considered full compensation for all labor, equipment, materials, and hauling necessary to produce a complete and acceptable operation."

In view of the above provision, Item No. 121—Sand Blasting, it is our opinion that there is no legal justification for raising the unit price for sand blasting from \$0.20 to \$0.40 a square foot and, therefore, we return Commissioner DeMent's request for the issuance of a Change Order to increase the contract by \$10,234.00 marked "not approved".

PAYMENT FOR MATERIALS AFTER ENGINEER'S APPROVAL

(Commissioner of Public Works—J. G. O.—June 25, 1963)

We are in receipt of your letter of June 17, 1963, which reads in part as follows:

"Please refer to our request of May 24, 1963, for an opinion regarding payment for Porous Granular Backfill on the subject contracts, and upon which request, your opinion was given under date of June 10, 1963.

We concur with your opinion which was based on our original request; however, because of the fact that further review of the Engineer's records revealed the following information, we respectfully request that we be advised if it is required that payment shall be made for all of the materials in question that were delivered to the job-site.

1. None of the tickets for the delivery of the materials to the job-site were signed by any representatives of the City.
2. Material placed in the trench and later ordered removed by the Resident Engineer because of its being contaminated with foreign materials resulting from cave-ins and various other operations of the Contractor.

3. Material placed outside of the limits as shown on the contract plans.
4. Material delivered and stock piled and then not placed in the trench."

In answer to No. 1, there is no requirement in the specifications that the delivery tickets be signed by a representative of the city; such signing, however, would be evidence that the approved loads were ordered by the Engineer.

In answer to No. 2, Messrs. Collins and Zalewski of the Bureau of Engineering have advised that the contractor did not bill for materials placed in the trench and later ordered removed by the resident engineer.

No. 3 refers to material placed outside of the limits as shown on the contract plans. You refer, no doubt, to that material which was used as fill beyond the theoretical neat lines.

The specifications under Item 41—Pile Underdrains, 12-Inch, on pages J-43 and J-44, require that the contractor use steel sheet piling and further requires, on page J-44, that

"Before commencing work on this item, the Contractor shall submit for approval of the Engineer the location, design and details of the steel sheet piling, bracing, falsework or other method of protection required to support the sidewalls of the trench. He shall also submit for approval the type and method of placing, holding and lifting or removal of the vertical forms used to separate the fine granular filter from the coarse granular filter during their placement."

The engineer approved the location, design and details of the steel sheet piling and in view of this, it is our opinion that payment must be made for any fill that was used outside of the theoretical neat lines.

No. 4 refers to material delivered and stock piled and then not placed in the trench. The paragraph on Construction Methods provides:

"The fine and coarse granular backfill material shall be placed in the pipe underdrain trench to the lines, grades and section as shown on the plans. The material shall be placed in the trench in such a manner so as to keep compaction to a minimum to provide proper filtering action."

The paragraph on Method of Measurement in both contracts states that:

"The fine or coarse porous granular backfill shall be measured for payment in tons which will be the actual amount of material used to complete the work as shown on the plans or ordered by the Engineer. The Contractor shall deliver to the Engineer, at the time of depositing each load of porous granular material a ticket in triplicate signed by a certified public weighmaster, showing the net weight of the fine granular material or coarse granular material."

The paragraph on Basis of Payment in both contracts provides that:

"This work will be paid for at the contract unit prices per ton for Porous Granular Backfill, Fine and Porous Granular Backfill, Coarse, measured as herein specified, which prices shall be payment in full for furnishing, hauling and placing the material as shown on the plans or ordered by the Engineer and as herein specified."

In view of the above, it is our opinion that the contractor should be paid for the porous granular, fine, and porous granular backfill, coarse, in accordance with the weights shown on delivery tickets.

PAYMENT FOR ADDITIONAL WORK

(Purchasing Agent—J. G. O.—July 1, 1963)

We are in receipt of a copy of Commissioner DeMent's letter to you in which he advises that the contractor has requested additional compensation in the amount of \$113,750.37 for the cost of circular bolted liner plates and additional concrete required because of the use of the circular bolted liner plates.

The Commissioner of Public Works asks whether there is any legal validity to the contractor's claim.

In reviewing your file, we find that the contractor requested authorization of the Department of Public Works to use circular liner plates and the department approved the drawings for the circular plates as follows: "Approved As Noted. Contractor's responsibility for dimensions in compliance with all contract requirements is not hereby affected".

The contractor, in a letter requesting additional compensation, stated, in part, as follows:

"It is evident that extra-sensitive clay was encountered that was not indicated by the regular soil-boring information which showed moisture content and unconfined compressive strength."

The specifications and contract documents state, in part, in Section 200, page H-2, as follows:

"As the work progresses, changes or modifications in such procedure or in such methods, structures and equipment may be required by the Engineer. In such event, upon notice from the Engineer to the Contractor, further work shall be performed only in accordance with such changed or modified procedure and such changed or modified methods, structures and equipment, as the case may be, as shall have been submitted to and approved by the Engineer in writing."

The Commissioner of Public Works on May 23, 1961, recommended that the Purchasing Agent grant a time extension of 47 days to the subject contractor for the following reason:

"The contractor was delayed due to the very poor and plastic soil conditions and in order to complete this contract it was necessary to resort to compressed air. This made it necessary to construct and operate a compressed air plant in order to complete the work."

Previously, the Commissioner of Public Works on January 30, 1961, had recommended a 77 day extension of time to the Purchasing Agent for the following reasons:

"For pumping out sewer tunnel which was flooded by three water filled utility duct lines. Nondelivery of steel Arch Ribs from the supplier—for changes required in construction procedure and methods due to the soft soil conditions."

It is apparent that the Commissioner of Public Works recognized the poor and plastic soil conditions as is evidenced by his letter of May 23, 1961, referred to hereinabove.

It is clear, on examination of the design drawings prepared by the City, that the sewer tunnel was to be of a semi-elliptical design supported by conventional ribs and plates. The change in design to circular liner plates, which was approved by the Commissioner, was not a "minor change" permissible under Section 219 of the Specifications, but was, in fact, a major alteration in design which was only permissible under Section 4.3 of the Specifications.

The approval of the plans by the Commissioner (Engineer) was tantamount to a direction by him and hence the contractor is entitled to additional compensation for all work directly related to the change in design, namely, (1) the additional cost of circular bolted liner plates over approved conventional ribs and plates; (2) additional cost of excavation and concrete due to change to circular bolted liner plates, said change in design having been approved by the Engineer on the drawings.

We also believe that the contractor should be compensated for the extra work on shaft No. 1 which was sunk by the contractor and then ordered pulled by the engineer. The engineer stated that the removal of this shaft was made necessary by the lack of progress under the subject contract, but the engineer stated that the delays on the part of the contractor were due to poor soil conditions and recommended an extension of time; hence, compensation for this item is proper.

The extra compensation requested by the contractor for additional costs due to the use of "compressed air" is, in our opinion, an invalid claim in view of the specifications.

Section 200 concerning Procedure, Methods and Equipment reads, in part, as follows:

"The contractor shall determine the methods to be employed, the procedure to be followed, the equipment, plant, falsework, shoring, bracing and other temporary structures and equipment to be used on the work under this contract, subject to the requirements of these specifications and to the approval of the engineer."

We do not believe that the contractor is entitled to additional compensation for the following items which were not related to the change in design, namely: Extra work stripping and replacing overburden on tunnel section between Sta. 201-80 and Sta. 203-50 in attempt to stabilize shifting ground at work level; Extra work removing tunnel section and replacing ribs and plates from Sta. 205-80 to Sta. 206-40; Extra work removing tunnel section from Sta. 195-50 to Sta. 194-00.

However, the contractor is entitled to \$95,601.38 compensation for the additional cost of circular bolted liner plate over approved conventional ribs and plates, and for the additional cost of excavation and concrete due to the change to circular bolted liner plates and for the work on shaft No. 1 which was sunk by the contractor and then ordered pulled by the engineer, if, in your opinion, the amount is reasonable.

EFFECT OF RESOLVED AMBIGUITY

(Purchasing Agent—J. G. O.—August 2, 1963)

Your letter requests our opinion concerning steps that may be taken by your office to resolve the conflict in the above-captioned transaction.

The documents transmitted with your letter indicate that a requisition was placed by M. T. S. with your office requesting the purchase of certain bleached cotton bed sheets describing same in detail, specifying a 140 thread count and requiring "Stevens, Utica, Mohawk Brand or Equal".

Your department prepared a quotation sheet describing the desired material in identical terms. Karolls, Inc. returned the quotation, but, below the description, quoted prices separately for the "Stevens Utica Brand" and the "Stevens Mohawk Brand". Karolls, Inc. canvassed as low bidder for the "Stevens Mohawk". Your purchase order was sent to Karolls, Inc., specifying the "Stevens Mohawk Brand" as bid.

Inspection after delivery of the materials disclosed that the sheets delivered had a thread count of approximately 135, not 140, and for that reason the bidder was notified that the materials were rejected and he was instructed to remove same from M. T. S.

Since the Requisition, quotation and Purchase Order specified the brand name "Stevens, Utica, Mohawk brand or Equal", the City is charged with knowledge of the quality of those brands. J. P. Stevens & Co., Inc. informs us that bleached sheet under the brand name "Stevens Mohawk" are not manufactured in a thread count of 140. We believe that the description of the materials was initially ambiguous, but that the ambiguity was resolved when the Karolls bid separately on the two lines of the manufacturer. Because the purchase order specified "Stevens Mohawk Brand", as taken from the bidder's quotation, the documents evidence the intention of the City to purchase that brand and quality notwithstanding the T-140 characterization.

If the reduced thread count is the only basis for your rejection of the material, we believe that the rejection is improper and that the City is bound to accept and pay for the goods at the bid price.

LENGTH OF CONTRACT

(Purchasing Agent—R. L. H.—March 17, 1964)

Your recent letter requests our opinion generally as to whether contracts may be entered into for commodities for a 5 year period, and refers specifically to one instance where it might definitely be to the City's best interest to do so.

Please be advised that the Municipal Purchasing Act appearing as Sections 8-10-1 through 8-10-23 of Chapter 24 of the 1963 Illinois Revised Statutes contains no prohibitions on contracts of this length. One fact, however, must be taken into consideration, that the City is run on a fiscal year basis and appropriations are voted annually. Therefore, contracts to run for a period beyond a fiscal year must contain sufficient language to allow the City to terminate in the event no appropriation is voted for any year of the term and in the event the commodity involved is no longer needed. Price reductions must also be considered over the long term and advantage thereof must be taken.

The underlying questions to be considered individually in each and every proposed contract extending beyond a single fiscal year are whether it is in the best interest of the City to enter into such a contract; whether the commodity involved is one which will be needed for the term considered; whether the price obtainable on a multiple year offering will be that much better than that obtainable on single year requests for bids; and whether funds will be appropriated with a reasonable degree of certainty for this commodity for the life of the proposed term.

Subject to the foregoing, it is our opinion that there would be nothing legally objectionable in entering into 5 year commodity contracts.

If we can be of assistance to you in any manner in the foregoing, please feel free to call upon us at any time.

F.O.B. DELIVERY

(Purchasing Agent—R. L. H.—May 4, 1964)

Your letter of April 27, 1964, with letter attached from Rockwell Mfg. Co. requests our opinion as to when title passes and whether the additional discount feature can be legally adapted to the above cited contract.

Please be advised that when merchandise is shipped F. O. B. seller's factory, it is the intention that title to the merchandise passes to the buyer as soon as the merchandise is delivered to a carrier for shipment.

Insofar as the additional discount provision is concerned, agreements can be legally entered into with the low bidder on any competitively bid contract to reduce the bid price without effect on the legality of the competitive bidding procedures.

From a legal standpoint, then, there is nothing legally objectionable in accepting additional discounts from the low bidder on the contract and accepting the merchandise to be supplied on a F. O. B. point of origin basis. The only requirement is that a factual determination must be made to indicate that:

1. In view of the addition of transportation costs to each shipment, the additional 5% discount is in fact a discount over the current contract price; and,

2. It would be in the city's best interest (and not a possible detriment) to accept the merchandise in question F. O. B. point of origin rather than F. O. B. our shops and have title to this merchandise pass to the City as soon as it is shipped rather than upon receipt.

It is therefore our opinion that subject to a determination that the city's best interests would be served thereby, there would be nothing legally objectionable to the proposal contained in the April 14, 1964 letter from the Rockwell Manufacturing Company.

If we can be of further service to you in this matter, please feel free to call upon us at your convenience.

ADDITIONAL WORK DEFINED

(Purchasing Agent—R. L. H.—March 31, 1965)

We return herewith the request of Commissioner Pikarsky for the issuance of a change order increasing the amount of the subject contract by \$40,700.00, without our approval.

It is our opinion that the work contemplated by this change order is totally and completely unrelated to the work provided by the aforementioned specifications and is nowise necessary for the proper completion of the work set forth in the contract such that said work cannot be considered "extra work" which would be a proper subject for a change order.

Additional work is work not contemplated by the original specifications, and in addition thereto, is work which is not necessary for the proper completion of the specified work. We note that the letter of request refers to the

work to be covered in the change order as additional work, indicating that this term was used in its proper context.

A discussion of "extra work" supporting the foregoing can be found in the case of *Great Lakes Dredge and Dock Co. v. City of Chicago*, 353 Ill. 614.

It is therefore our opinion that the work contemplated by the change order request is properly the subject of a separate contract which must be advertised and let pursuant to the provisions of the Purchasing Act.

CONTRACT TERMINATING IN A SUBSEQUENT FISCAL YEAR

(Acting City Comptroller—M. E. A. & S. R. D.—April 20, 1965)

Reference is made to your letter of April 12, 1965, in which you request our opinion as to whether Section 8-1-7 of the Illinois Municipal Code (Ill. Rev. Stat. 1963, ch. 24, Par. 8-1-7) prohibits the Purchasing Department from executing a twelve month contract beginning in the present fiscal year and expiring in the subsequent fiscal year.

Section 8-1-7 reads in part :

"No contract shall be made by the corporate authorities, or by any committee or member thereof, and no expense shall be incurred by any of the officers or departments of any municipality, whether the object of the expenditure has been ordered by the corporate authorities or not, unless an appropriation has been previously made concerning that contract or expense. Any contract made, or any expense otherwise incurred, in violation of the provisions of this section shall be null and void as to the municipality, and no money belonging thereto shall be paid on account thereof."

You have also advised us that one of the standard clauses in the contracts in question is as follows :

"The contract can be terminated upon 30 day written notice by the Purchasing Agent if there is no further need for the requirement, or if sufficient funds have not been appropriated to cover the estimated requirement."

It is our opinion that Section 8-1-7 does not allow you to contract and incur liability to the City for the next fiscal year when the appropriation budget for that year has not as yet been passed. It is true that under the standard clause in the contracts in question, as set out above, that the contract may be terminated on 30 day written notice, if sufficient funds have not been appropriated. However, since the appropriation budget is usually passed by the City Council some time in December of the year prior to the year covered by the appropriation budget, more often than not, there would not be the requisite 30 day period in order to terminate the contract prior to the beginning of the new fiscal year when there has been no appropriation to cover the contract liability for that new fiscal year.

It is our opinion, however, that your problem can be resolved by adding a new provision to the contracts in question, which will automatically terminate the contract if money has not been appropriated for the contract liability in the second year of the contract. We would suggest that this provision be worded in a manner similar to the following :

"The contract shall be terminated upon commencement of each fiscal year when the appropriation budget for such year does not include

adequate funds to satisfy the City's liability in regard to such contract. At the time the appropriation budget is passed by the City Council, the Purchasing Agent shall notify in writing all parties to the contract as to whether or not funds have been appropriated by the City Council to cover the City's liability for the new fiscal year."

With this added provision, it is our opinion that the Purchasing Agent may continue his present contract procedures without violating Section 8-1-7.

Moreover, under such proposed procedure, neither the Mayor nor the Comptroller need take any action in the new fiscal year, either to continue or to terminate the particular contract.

If there are any questions in regard to the foregoing, please feel free to contact the undersigned.

SPECIAL CONTRACTS

(Purchasing Agent—M. E. A. & S. R. D.—May 20, 1965)

Reference is made to the above described contract.

Earlier this year you advertised for bids for the installation of a Computer/Data Logger at the City of Chicago's Central District Water Filtration Plant. Bids were received from the following firms: Bristol, IBM Corp., and Central Data Corp. Although varying somewhat from the City's bid specifications, IBM's bid was substantially lower than the other two.

However, you are now of the opinion that the City should not at this time accept any of the bids because within a year or two all three firms will be offering decidedly more efficient computer products at significantly reduced prices. Nevertheless, considerations of public health require that a computer be installed as soon as possible. For this reason, you now propose that we lease the current IBM computer with the rental payments to be applied toward the purchase of an IBM computer which will be marketed in a year or two. It has been suggested by others that this lease-purchase arrangement could be undertaken by the City within the framework of the aforementioned IBM bid. It is our opinion that this cannot be done.

The present IBM bid (as well as the other two) are for the *outright purchase of current* computers. The proposed "lease- (current computer) -purchase (future computer) plan" is not within the framework of the aforementioned specifications. Therefore, in order to enter into such lease-purchase agreement, the three current outright purchase bids must first be rejected. You have indicated to us that you have a basis for rejecting these three bids as unsatisfactory.

Once these bids are rejected, there are three ways under the Illinois Municipal Code for the City to enter into the proposed lease-purchase agreement.

1. Section 8-10-3 (Competitive Bidding)

Under Section 8-10-3 of the Illinois Municipal Code (Ill. Rev. Stat. 1963, ch. 38, § 8-10-3), new bids can be sought for the proposed lease-purchase plan. *Disadvantage:* The time required for the advertising and accepting of such bids.

2. Section 8-10-5 (Emergency Contracts)

Under Section 8-10-5 of the Illinois Municipal Code (Ill. Rev. Stat. 1963, ch. 38, § 8-10-5), the purchasing agent "in the case of an emergency affecting the public health or safety (the dangers of improper regulation of the amounts

of chemical being injected into the public drinking water under present procedures)" may execute an "emergency contract" without competitive bidding. *Disadvantage:* The City Council by majority vote would have to proclaim that such emergency exists.

3. Section 8-10-4 (Special Contracts)

Section 8-10-4 of the Illinois Municipal Code (Ill. Rev. Stat. 1963, ch. 38, § 8-10-4) reads in part as follows:

"Contracts which by their nature are not adapted to award by competitive bidding, such as * * * shall not be subject to the competitive bidding requirements of this Article."

The omitted part of the above sentence lists specific types of contracts not subject to competitive bidding. However, those named types of contracts are not exclusive as to types of contracts "not adapted to competitive bidding." In this regard, Section 8-10-4 has been construed as follows (24 Opinions of Corporation Counsel, p. 687):

"We are of the opinion that the language following the words, 'such as' are not restrictive of the objects for which no bids are to be taken because if such a restrictive meaning were given then bidding would be required for equipment or services previously furnished or contracted for required for equipment or services previously furnished or contracted for and which can be obtained from only one source, as in the case of a manufacturer who is the sole source of supply for repair parts for machines he has made and sold to the city."

You have indicated that in your opinion because of the unique demands of the computer sought, the lease-purchase contract is "not adapted to award by competitive bidding." The apparently unsatisfactory bids for the outright purchase contract supports this opinion.

CONCLUSION

The three bids for the outright purchase contract should be rejected. A new lease-purchase contract should be executed under either Section 8-10-3 or Section 8-10-5 or Section 8-10-4 of the Illinois Municipal Code. A contract executed pursuant to Section 8-10-4 appears to be the most satisfactory.

SUBLETTING OR ASSIGNING PROVISION

(Purchasing Agent—C. F.—May 9, 1966)

Pursuant to your recent request we are returning herewith the above cited Notice of Change of Ownership without this department's approval.

Our disapproval is based on provisions contained in Addendum No. 1, dated April 28, 1965, to the contract involved here, signed by John F. Ward, Purchasing Agent, and approved by the U. S. Bureau of Public Roads.

The Addendum contains a revision of Section 17 of the contract to read as follows:

"Section 17. Attention is called to Section 'VI Subletting or Assigning the Contract' Of Required Contract Provisions, Federal-Aid Contracts Interstate Highways (Act of 1956) attached in back of Part 2 of the contract documents for this contract."

The aforementioned Section VI, Subletting or Assigning the Contract, contains Sub-section No. 5 which the Contractor, Fitz Simons & Connell Dredge & Dock Division, Merritt-Chapman & Scott Corporation, must comply with as a condition precedent to our approval of the proposed change in ownership request with Dunbar & Sullivan Dredging Company. This sub-section states the following:

"No portion of the contract shall be sublet, assigned, or otherwise disposed of, except with the written consent of the State highway department contracting officer, or his authorized representative, and such consent when given shall not be construed to relieve the contractor of any responsibility for the fulfillment of the contract. Request for permission to sublet, assign or otherwise dispose of any portion of the contract shall be in writing and accompanied by (a) a showing that the organization which will perform the work is particularly experienced and equipped for such work, and (b) on assuring by the contractor that the labor standards provisions set forth in this contract shall apply to labor performed on all work encompassed by the request."

If we can be of further aid in clarifying or expediting the above, please call on us.

MAXIMUM LIMIT ON LIQUIDATED DAMAGES

(Commissioner of Public Works—P. A. L.—December 12, 1966)

We acknowledge receipt of your recent letter of October 17, 1966, in which you request an opinion as to the maximum limits of daily charges for liquidated damages specified in your contracts.

The following is cited in *Jones v. Stevens*, 112 Ohio St. 43, 146 N. E. 894:

"Liquidated Damages—To determine whether a sum named in a contract is intended as penalty or as liquidated damages, it is necessary to look to the whole instrument, its subject matter, the ease or difficulty of measuring the breach in damages and the amount of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach, and also to but intent of the parties ascertained from the instrument itself in light of the particular facts surrounding the making and execution of the contract.

Where the parties have agreed on the amount of damages, ascertained by estimation and adjustment and have expressed this agreement in clear and unambiguous terms, the amount so fixed should be treated as liquidated damages and not as a penalty if the damages would be:

- (1) uncertain as to amount and difficult of proof, and
- (2) if the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties, and
- (3) if the contract is consistent with the conclusion that it was the intent of the parties that damages in the amount stated should follow the breach thereof."

In *Weber v. Moy*, 183 Ill. App. 200, the Court states:

"Where the contract provides for damages, courts seek to ascertain possible actual damages sustained and if it is possible to do so or if amount of liquidated damages mentioned in the contract is exorbitant

court will construe amount as a penalty rather than as liquidated damages."

"Courts will uphold and enforce a contract provision for liquidated damages, where it was reasonable at the time of making of contract to so contract." S. H. A. Ill. Chap. 26, § 2-718, *Bethlehem Steel Co. v. City of Chicago*, 234 F. Supp. 726.

"Structural steel erection contract provision for \$1,000 per day liquidated damages for delay was reasonable and enforceable by City against contractor, regardless of fact that highway route was timely opened." *id.*

In the field of construction contracts, it is almost universally true that, assuming compliance with the other essentials of a valid clause, reasonable per diem damages for each day of delay will be upheld in view of the uncertainty of computing actual damage. *American Bank & Trust Co. v. Langston*, 180 Ark. 643, 22 S. W. 2d 381 (1929); *Commercial Inv. Co. v. Herman*, 98 N. J. Eq. 589, 131 Atl. 223 (1925); *Star Sand Co. v. City of Portland*, 96 Ore. 323, 189 Pac. 217 (1920); *Wells v. City of Philadelphia*, 270 Pa. 42, 112 Atl., 867 (1921); *Weiss v. USF & G*, 300 Ill. 11, 132 N. E. 749 (1921); *Lee v. Bergesen*, 58 Wash. 2d 462, 364 P. 2d 18 (1961).

Some suggestions to be considered in liquidated damages clauses were cited in the Ohio State Law Journal, Volume 20, page 221 and are as follows:

- (1) Make sure the damages stipulated will fall within the range between the upper and lower limits of potential actual damages foreseeable at the time of the contract otherwise the provision is likely to be held to be invalid as prescribing a penalty.
- (2) See to it that the parties actually, seriously negotiate on the question of amount or measure of liquidated damages, with full consideration of all foreseeable consequences of breach. Then, for added protection, incorporate in the contract recitals which will show that they have done so.
- (3) If the contemplated breach is of a covenant which requires the party to perform a particular act within a time limit, provide suitable machinery for reasonable extensions to adjust for delays which may result from actions or derelictions of the other party or of third parties. Especially do so in construction contracts.
- (4) Make the amount of damages agreed upon vary with the extent of the breach, such as duration of the delay or period of default.
- (5) Incorporate a suitable recital indicating that it was the intention of the parties to provide for liquidated damages; at least, characterize by using the words "liquidated damages". Before some courts, it may help.
- (6) Recite the facts which caused the parties to incorporate the provision in the contract, such as that, for stated reasons, the amount of damages upon the breach will be very difficult to ascertain with precision.
- (7) Consider incorporating factual recitals which can, in the event of a lawsuit, be pointed to in order to show that the breaching party has knowledge that specific types of substantial injuries would or might be sustained by the other party from the former's breach (This can be "good medicine" in many contracts, with or without liquidated damage provision).
- (8) If a situation is otherwise than one calling for a liquidated-damage clause, but is not feasible at the time of the drawing of the contract to develop a satisfactory, reasonable and equitable single sum to be paid, consider specifying a measure or formula by which damages can be subsequently computed.

- (9) In case of a construction contract providing for liquidated damages for delay in completion, consider adding a provision that the right to liquidated damages shall survive the contractor's complete abandonment of the work, and its completion by the owner.

Thus, from the foregoing, it may be ascertained that the amount of liquidated damages must generally be determined from the factual situation surrounding a particular contract rather than by the insertion of an otherwise unsubstantiated schedule. In order to sustain any provision relating to liquidated damages, regardless of the amount thereof, it must be shown to a Court that such provisions would meet three primary tests which may be referred to as the intent test, the reasonableness test and the uncertainty test. Consequently, this department would, where occasion arises, be available to discuss the measure of proper liquidated damages.

REQUIREMENTS FOR TIME EXTENSION

(Purchasing Agent—C. F.—December 22, 1966)

Pursuant to your recent communication, we are returning the above cited matter without action by this Department.

The Commissioner is requesting an extension of time for Contractor under terms contained in Provisions 11, Section 120, captioned "Provisions Relative to Delay" in the basic contract.

While the requested extension of time may be grounded on merit, Commissioner apparently has overlooked certain requirements in the aforesaid section and an examination of the documents made available to this department fail to show that these requirements have been complied with.

They follow briefly :

1. No extension of time shall be granted unless Contractor first notifies the Commissioner and Purchasing Agent in writing of causes of his anticipated delay within ten (10) days from the beginning of such delay, stating the approximate number of days he expects to be delayed.
2. Contractor, also, must make a request in writing to the Commissioner and Purchasing Agent for an extension of time within ten days after cessation of the delay. Commissioner then will analyze and make a recommendation to the Purchasing Agent in writing as to the number of days in extended time his records indicate are warranted.

It is suggested further that the same section states that compliance with these requirements are conditions precedent to the granting of any time extension and that failure to comply shall not entitle Contractor to the requested time extension.

We suggest that the above-cited Contract Modification request is premature, in review of the provisions cited in Section 120 and the fact that the time extension period will not terminate until December 31, 1966. The Contractor should be asked to comply fully in other respects with the said contract terms.

After such compliance is obtained we will be happy to expedite approval of the attached request. If we can be of any further assistance in this matter please do not hesitate to call on us.

CONTRACTS AS AFFECTED BY SNOWFALL

(Commissioner, Department of Streets and Sanitation—B. Q. O.—
May 31, 1967)

We have your letter of April 26, 1967, enclosing requests for payment from the Duncan Parking Meter Maintenance Company for work performed in the latter part of January and February allegedly as a result of the heavy snowfall conditions and requesting our opinion as to whether the work performed by the Company falls within the terms of its contract with the City.

Your letter requesting a review of the contract, poses the following questions:

- "1. Whether or not these improvements and repairs as well as replacement of boxes come under the terms of the contract. They have informed the Bureau of Parking that these were circumstances over and above that required under the terms of the contract. They further allege that said incidents arising for repairs or replacement of parts to the meters came about through traffic accidents while snow plowing operations were in progress either through snow plows or other forms of snow equipment. It is the contention of the Bureau of Parking that all said repairs, replacements, etc. fall under the terms of the contract Page D-7 and Paragraph 1 under Scope on page D-1 of the 'General Conditions' of said contract, copy of which is enclosed for your information.

"a. *Coin Box Maintenance*

The contractor shall be responsible for the repair and replacement of the approximately 64,000 coin box containers comprising the parking meter plant. The collection contractor shall, from time to time, turn over damaged coin box containers to the maintenance contractor. The maintenance contractor shall promptly repair all repairable coin box containers and replace within 30 days all unrepairable coin box containers.

"b. *Scope*

It is also estimated that approximately 3,000 meter case units will have to be replaced each year as a result of larceny, malicious mischief, traffic accidents, construction operations or vandalism. This is an estimate only and does not limit the unconditional obligation of the contractor to replace any number of units required as a result of the above mentioned incidents.

- "2. May we have your opinion as to whether or not the work performed by Duncan Meter Corp. falls within the terms of the contract as enumerated above or whether this is to be considered an Act of God over and above the terms and intent of the contract between Duncan Parking Meter Maintenance Corp. and the City of Chicago, thus requiring payment for said billing."

In our opinion, the requests for payment from the Duncan Parking Meter Maintenance Company, enclosed in your letter, should be denied as not being valid claims, on the ground that all of this service and type of work is work to be performed and expense to be incurred by the contractor under the terms of the Contract Documents, and cannot be claimed as extra work or extraordinary work requiring additional compensation to the contractor by reason of the heavy snowfall conditions, or even possible negligence of the City.

We shall now set forth the various provisions of the above Contract and Specifications and Contract Documents which we construe to reveal the intention of the parties which supports our opinion.

First, the Detail Specifications define the "Scope" of Contract Documents No. 70-64-14 on page D-1, as follows:

"Scope

The contractor shall furnish parking meters, meter mechanism, component parts, coin boxes, locks and keys; pedestals, base flanges, foundations, appurtenances, supplies, tools equipment, implements, materials, motor vehicles, records, office space, shop space, communication facilities, office personnel, field personnel and supervision, to adequately inspect; maintain, adjust, repair, replace, install, remove, relocate, convert, test, oil, and clean the parking meter plant of the City of Chicago. He shall replace as a part of this service the entire meter plant of the City of Chicago, comprising approximately 30,000 'Chicago Meters', described in the City Specification Documents Nos. 35-50-2A, 35-52-2, 35-54-1 and 35-57-1 with a heavy duty, burglar-resistive meter case unit, consisting of the operating housing, collection housing and burglar resistive door with door cam assembly hereinafter described as: Drawings Nos. BR 400, 401, 402, 403, 404, 405 and 406 at his own expense. It is also estimated that approximately 3,000 meter case units will have to be replaced each year as a result of larceny, malicious mischief, traffic accidents, construction operations or vandalism. This is an estimate only and does not limit the unqualified obligation of the contractor to replace any number of units required as a result of the above mentioned incidents. The Commissioner of Streets and Sanitation at his option under a 5-year contract may elect to accelerate the replacement of units as described under 'Detailed Specifications' up to an additional 3,000 units during each year of the contract.

"The contractor shall make available to the Commissioner of Streets and Sanitation at all times the opportunity to inspect his facilities, equipment, inventory, vehicles, communication system, and any and all opportunities as provided in this contract. The Commissioner of Streets and Sanitation shall be furnished a list of all employees of the Contractor who are assigned to the maintenance of parking meters and a brief description of their assignments. The Commissioner of Streets and Sanitation shall be the sole judge of the adequacy of the above mentioned items for carrying out the terms of the contract.

"Within 30 days following the official notice to begin work by the Commissioner of Streets and Sanitation, the contractor shall be fully equipped to perform all the terms and provisions of this contract."

From these provisions it is patent that the contractor has assumed the duty and obligation not only to *"furnish parking meters"* etc., but also to furnish all equipment and personnel *"to adequately inspect, maintain, adjust, repair, replace, install, remove, relocate, convert, test, oil, and clean the parking meter plant of the City of Chicago. He shall replace as a part of this service the entire meter plant of the City of Chicago, comprising approximately 30,000 'Chicago meters' * * * at his own expense."* (Emphasis supplied.)

This obligation to replace the entire meter plant of the City is an "unqualified obligation" of the contractor to replace any number of units required as a result of the specified "incidents", namely, any and all "meter case units" which "will have to be replaced each year as a result of larceny, malicious mischief, traffic accidents, construction operation or vandalism."

In addition, under the "Scope" provisions on page D-1 of the Contract Documents, this being a five-year contract, the Commissioner of Streets and Sanitation at his option may elect to accelerate the replacement of units up to an additional 3,000 units during each year of the contract.

Secondly, the Detail Specifications entitled "Replacement of Parking Meters", on pages D-2 and D-3 of the Contract Documents, provide as follows:

"Replacement of Parking Meters

When *replacing parking meters because of damage or loss from larceny, malicious mischief, traffic accidents, construction operations or vandalism, contractor shall upon notification or at his own expense because of inspection, install a heavy duty burglar-resistive meter case consisting of the operating housing, collection housing and meter housing door and door cam assembly as described herein under 'Meter Case and Doors' Drawings Nos. BR 400-401, 402, 403, 404, 405 and 406 at his own expense. These replacements are to be made promptly.*

"Any meter which must be replaced as provided above shall be replaced as a complete unit containing the operating mechanism. The operating mechanism before assembly into the modified case shall be completely overhauled and reconditioned." (Emphasis supplied.)

Thirdly, the Detail Specifications entitled (p. D-6) "Insurance", after providing that public liability and property damage insurance on all vehicles used by the contractor or his employees in performance of work under this contract shall be carried by the owner of the vehicle, in specified amounts, provides as follows:

"The Contractor also agrees to save the City harmless from all damages caused by his employees."

Fourthly, the Detail Specifications, entitled "Record and Reports", on page D-6 of the Contract Documents, provides as follows:

"The Contractor shall establish and maintain a system for recording inspection, maintenance and repair service performed on a district and individual meter basis. The Contractor shall furnish to the Commissioner of Streets and Sanitation a daily report showing the districts in which the inspections were made and summarizing, by districts, the major repairs made, classifying by cause among: (1) inherent mechanical failures; (2) Traffic accident damage; (3) Damage due to tampering, larceny, malicious mischief and vandalism. The records system and the form of reports shall be subject to the approval of the Commissioner of Streets and Sanitation. A completed report for every periodic inspection, irrespective of meter conditions, is required. The Contractor shall maintain a log of all complaints on parking meter operation received from the Commissioner of Streets and Sanitation, other departments of the City of Chicago, or citizens. The Contractor shall render repair and maintenance immediately in response to these complaints. Payroll, inspection, repair, cleaning and maintenance records and material and parts records of the contractor, pertaining to this contract, shall be available for inspection, upon request, by the Commissioner of Streets and Sanitation." (Emphasis supplied.)

Fifthly, the Detail Specifications, entitled "Inspection" on page D-8 of the Contract Documents, provides in part as follows:

"The day of inspection may be changed by the Commissioner upon reasonable notice to Contractor. Should a parking meter be found inoperative or defective during the inspection, the Contractor shall immediately correct the fault and render the parking meter operative on site." (Emphasis supplied.)

Sixthly, the Detail Specifications, entitled "Survey and Tests" on pages D-9 and D-10 of the Contract Documents, provides in part as follows:

"The Commissioner of Streets and Sanitation reserves the right to call upon the Contractor to furnish repair, maintenance service and

cleaning at such times as he deems advisable, and this service shall be construed to be a function of this contract." (Emphasis supplied.)

Seventhly, the Detail Specifications, entitled "Termination of Contract" on page D-10 of the Contract Documents, provides in part as follows:

"Upon termination of the contract, the contractor shall turn over to the Commissioner of Streets and Sanitation, the parking meter plant of the City of Chicago in good working order, and all keys that have been used in maintaining the plant, and the parking meters that may have been removed and are being held on a credit basis." (Emphasis supplied.)

Eighthly, the Detail Specifications entitled "New Parking Meter Parts Guarantee" on pages D-10 and D-11 of the Contract Documents, provides as follows:

"In accordance with the terms of specification No. 35-57-1 for approximately 1,460 parking meters and Contract Number 19234 on November 16, 1957 under the paragraph entitled 'Replacement and Maintenance', the following is stated:

"The Contractor shall replace all parts due to defective materials or faulty workmanship on location at the contractor's expense within a period of 12 months from date of installation except the parts of those meters damaged by vandalism, malicious mischief or extreme impact.

"The City or its Agent will maintain all parking meters and supply all necessary parts for proper maintenance and all labor and other personnel, vehicles, equipment and appurtenances, except the repair or replacement of any parts due to defective material or faulty workmanship during the period of 12 months from the date of installation, after which period the City or its Agent will remove, replace or relocate any meter, pedestal or foundation, or all as required after installation."

"Bidders are hereby made cognizant of the above guarantee applicable to recently installed meters and meters to be installed which carry this guarantee, and the benefits and credits that accrue thereby shall be merged and reflected in the quoted unit prices under Items 'A' and 'B'."

In our opinion, the last quoted provision was to apprise bidders that the lesser risk of the contractor under the 1957 Contract would not be in effect, in view of the greater risk under paragraph "b. Scope" of this Contract, and that their bids should reflect this fact in the quoted unit prices under Items "A" and "B". The 1957 Contract, which is Contract No. 19234, Specifications and Contract Documents No. 35-57-1, covers the furnishing of parking meters to designated Parking Sites. The claims here in question under this Contract do not pertain to a replacement of any parking meters installed under the 1957 Contract. In our opinion, therefore, the quoted unit prices under Items "A" and "B" are presumed to have reflected the risk and to have been in relation to the greater risk assumed under paragraph "b. Scope". Moreover, the successful bidder under this contract is not the same corporation as the successful bidder under the 1957 Contract.

The contract documents make it the "unqualified obligation" of the contractor to replace all parking meters which shall be damaged, destroyed, lost or missing due to the causes specified, including all "traffic accidents".

The word "unqualified" has the meaning of "absolute" or "unconditional", not subject to, or defeasible on, any condition, not capable of being, or liable to be, voided, annulled or undone. It is used in contradistinction to "contingent" or "conditional" or "qualified". *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149.

An "obligation" is a "duty". *Rucks-Brandt Construction Co. v. Price*, 23 Pac. 2d 690, 692, 165 Okla. 178 (1933). In *Munzinger v. United Press Co.*, 52 App. Div. 338, 65 N. Y. Supp. 194, at page 196 (1900), it is said:

"The word 'obligation' originally meant a bond containing a penalty, with a condition for the payment of money, or to do or suffer some act or thing. Co. Litt. 172a. The meaning of the word, however, has gradually been enlarged by the courts, and it has ceased to be restricted to a bond or writing obligatory, and has been extended to mean a paper by which some fixed duty is assumed to be performed at a certain time, or an instrument in writing whereby one party contracts with another for the payment of money at a fixed date, or for the delivery of specified articles. But, however various have been the definitions given to the word, the one essential element has always been that it must be a written paper, the duty assumed by which must be a fixed duty. Bouv. Dict. tit. 'Obligation'; *Sinton v. Carter Co.* (C. C.), 23 Fed. 535; 17 Am. & Eng. Enc. Law. pp. 2, 3; *Basehore v. Rhodes*, 85 Pa. St. 44-46; *Strong v. Wheaton*, 38 Barb. 616-624; *State v. Campbell*, 103 N. C. 344-347, 9 S. E. 410."

In *Daube v. United States*, 1 Fed. Supp. 771, 772 (1932), it is said: "In financial matters the most common meaning of the word (liability), according to the dictionary, is 'that which one is under obligation to pay' and an 'obligation' is also defined as 'that which a person is bound to do or forbear.'" An "obligation" is ordinarily defined as that which a person is bound to do or forbear; any duty imposed by law, promise or contract. *Goodwin v. Freadrich*, Neb. 1938, 280 N. W. 917, 923.

In 46 C. J., Obligation, p. 849, it is stated:

"'Obligation' is correlative with 'right'. 'Obligation' rests upon one party; 'right' belongs to the other. *Holland v. Dickerson*, 41 Iowa 367, 370." "Obligation" is a generic word. *Sawyer v. Armstrong*, 23 Colo. 287, 290, 47 Pac. 391, 392 (1896). "Obligation" is a term of considerable scope: it is a legal liability, liability generally, whether such liability is founded in contract or tort. *Cabbage v. Citizens Bank & Trust Co.*, 31 Tenn. App. 283, 214 S. W. 2d 572, 574 (1948), where it is said:

"A determination of this issue resolves itself to a construction of the agreement in light of the circumstances surrounding its execution. Although the rule of *ejusdem generis* is persuasive, it is not conclusive. The intention of the parties may determine its applicability. * * * 'Obligation' is the particular word used in the subject assignment. It is a term susceptible of considerable scope, depending of course upon such words of limitation as may accompany it and the purpose of its usage as made manifest by the situation under which it is applied. 'The term "liability" has been defined as meaning "obligation" and "obligation" has been said to be equivalent to and practically synonymously with, "liability". "Obligation" has been defined as a legal liability, liability generally, whether such liability be founded in contract or tort.' 46 C. J. 849."

The word "accident", in its popular and ordinary sense, may be used to signify an undesirable or unfortunate event or occurrence which happened unexpectedly, and without design or intent, and it may result from human agencies alone, from the uncontrollable operations of nature, or from both such agencies, and the word "accident", in its more general legal sense, does not exclude human fault, termed as negligence, but is recognized as an occurrence arising from the carelessness of men, and the fact that the negligence of the person injured contributed to produce the result will not make it any less an accident. *Paulissen v. Jonas*, 311 Ill. App. 346, 349-351 (1941). Unintended or unforeseen consequences of reckless or negligent acts, and even of intentional acts, at least if not undertaken with malice or intent to injure a person hurt or property damaged, may be within the definition of "accident".

Vappi & Co. v. Aetna Casualty & Surety Co., 348 Mass. 427, 204 N. E. 2d 273, 276 (1964).

The common definition of the word "collision", as generally understood, is a violent contact between two objects. *Taylor v. Wheelock*, 249 Ill. App. 152, 155 (1928).

The word "collision" includes a mutual striking or dashing of a moving object, an automobile, with a stationary object. *Bromberg v. Fort Dearborn Casualty Underwriters*, 231 Ill. App. 323, 325 (1924); *Lepman v. Employers Liability Assurance Corp. of London*, 170 Ill. App. 379, 381 (1912).

Damage to a tractor and trailer when the driver lost control of them and they left the highway, dropped a number of feet and came into contact with resisting objects, such as rocks, trees, etc., was caused by a "collision", within the meaning of a conditional sales contract requiring the purchaser to keep the equipment insured against fire, theft and "collision", since the court would not give a narrow or technical meaning to the word "collision". *Illinois Appleton & Co., Inc. v. Carr*, 348 Ill. App. 393 (1952) (Abstract of Decision, Gen. No. 45, 791, First Division, First District).

In our opinion, the contractor assumed "the unqualified obligation" to replace any number of units required as a result of traffic accidents", in that "traffic accidents" is a generic or all-inclusive term and includes all damage, destruction or loss of parking meters resulting from any and all traffic accidents, without exception or condition, whatever kind of vehicle is involved, no matter by whom owned or operated, or in what manner it was operated at the time of the accident, without regard to or question as to any negligence or reckless or wilful and wanton conduct in its operation. It is our further opinion that no exception, condition or qualification is expressed in the contract, or may be implied, and that weather conditions, however extraordinary, even such as to be deemed "an act of God", do not excuse performance by the contractor to rectify the resulting damage to or loss of parking meters, at his own expense, pursuant to the clear and unambiguous terms of the Contract Documents, which define "such unqualified obligation".

Under ordinances of the City of Chicago granting permission to a street railway company to lay tracks upon or across streets within the city limits and imposing certain duties, obligations and liabilities to the city upon the company, including the obligation that it "shall, at its own expense, fill, grade, pave and keep in repair that portion of the streets occupied by it", etc.; that "The Company, upon the order of the Commissioner of Public Works and approval of the Board of Supervising Engineers, shall pave, repave, or repair the portions of the streets and public ways, which by this grant it is required to keep paved and in repair, whenever and as often as the same shall reasonably require paving, repaving or repairing. * * * under the direction of the Commissioner of Public Works, as aforesaid," the expense incurred by the company in repairing and restoring pavements removed or damaged by employees of the city in installing or repairing connecting water and sewer pipes for the benefit of users whose houses fronted on the streets occupied by the street railway right of way could not be recovered in an action against the city on the theory of an implied contract. *Chicago City Railway Co. v. City of Chicago*, 238 Ill. App. 402, 409 (1925).

The Court said (at pp. 408, 412) :

"The city's position on the contrary is that the ordinance definitely and positively makes it the duty of the plaintiff company to make all replacements or repairs of pavements in the right of way, including those made necessary solely by acts of the city in installing or repairing water or sewer pipes. * * * *The language used in the section of the ordinance and in the exhibit is clear and unambiguous, and we find no limitations in either relating to the cause or condition necessitating the repaving or repairing.* And in our opinion the provisions are not unreasonable. * * * Counsel for plaintiff contend in substance that the obligations imposed on the plaintiff company by the portions of the ordinances pleaded do

not include the 'restoration' of pavements. He attempts to draw a distinction between the words 'restore', and 'repair', but they are synonymous (*State v. Gibson County Com'rs*, 80 Ind. 478, 481). The Century Dictionary defines the word 'repair' as 'To restore to a sound, good or complete state after decay, injury, dilapidation, or partial destruction; restore; renovate.' In *Callender v. March*, 1 Pick. (Mass.) 418, 428, the word 'repair', as used in a statute in reference to certain highways being kept in repair, is defined to mean 'to replace or remake, *reficere*, to restore what has been impaired or injured.'" (Emphasis supplied.)

On appeal, this judgment of the Appellate Court was affirmed. *Chicago City Railway Co. v. City of Chicago*, 323 Ill. 246 (1926). The Supreme Court said (at page 250 et seq.):

"The language of section 15 required the company, at its own expense, to fill, grade, pave and keep in repair that portion of the streets occupied by it, and *the duty was unlimited* except by the expression, 'as more specifically provided for in said "exhibit B".' 'Exhibit B' made no such exception as the appellant claims in case the repairs were made necessary by the acts of the city. * * * There is no exception from this obligation of repairs made necessary by the removal of a pavement by the city in the process of laying water or sewer pipes across the railroad track. The effect of the provisions of the ordinance contained in section 15 and 'Exhibit B' was to make the street railway company liable, so far as the spaces of eight and sixteen feet, respectively, occupied by it were concerned, for the maintenance, repair and care of the street to the full extent to which the city was bound, and to relieve the city from all expense arising out of the filling, grading, paving, keeping in repair, sweeping, sprinkling and keeping clean that part of the streets. When the street became out of repair for any reason the duty of the city to repair it was imposed by this ordinance upon the company so far as the part occupied by it was concerned. As far as the public was concerned the city was under obligation to use reasonable care to keep all the streets in a safe condition, including that part which the company contracted to keep in repair, but as between the city and the company the duty devolved on the company of keeping in repair at its own expense the parts of the streets occupied by it of the width of eight feet or sixteen feet, according as the streets were occupied by a single track or double tracks, and in making the repairs it acquired no claim against the city for reimbursement. * * * If by the terms prescribed in the ordinance the company is required to make the repairs mentioned in its declaration, it has no cause of action for the sums expended in doing so. the question, therefore, is simply one of construction of the contract. * * * The duty of the company, at its own expense, to keep in repair the portion of the streets occupied by it is unequivocally declared by section 15 and cannot be regarded as subject to any exception which is not declared in terms equally unequivocal. * * * The rights in question are granted subject to all the provisions of the ordinance, and if the acts of the city which are complained of have been in accordance with the terms of the ordinance the city has no liability by doing them. * * * The contract was absolute and required the company to do everything that was necessary to keep the pavement in repair." (Emphasis supplied.)

In construing a contract, the primary object is to ascertain the intention of the parties, that intention being determined from the language of the contract, and no words can be added or taken from it which will change the plain meaning of the parties as expressed therein, nor may the courts engage in surmises as to what the parties intended but which they failed to express; and if the intention may be ascertained from the wording of the contract, rules of construction have no application. *Herlihy Mid-Continent Co. v. Sanitary District of Chicago*, 390 Ill. 160, 166 (1945); *Chicago Land Clearance Commission v. Jones*, 13 Ill. App. 2d 554, 560 (1957).

Contract provisions expressly precluding contractors from recovering damages for acts or delays from contractees, whether avoidable or unavoidable, whether the result of negligence of the contractees, or due to acts of God, or enumerated extraordinary weather conditions or abnormal weather conditions beyond such as usually occur during the times specified in such contracts, have been upheld by the Illinois courts. *Herlihy-Mid-Continent Co. v. Sanitary District of Chicago*, 390 Ill. 160, 163-168 (1945); *Underground Construction Co. v. Sanitary District of Chicago*, 367 Ill. 360, 368-371 (1937); *Ryan Co. v. Sanitary District of Chicago*, 390 Ill. 173, 175 (1945); *Ryan Co. v. Sanitary District of Chicago*, 317 Ill. App. 549, 571 (1943).

When the law casts a duty on a party, the performance shall be excused by act of God; but when a party, by his own contract, engages to do an act, it is deemed his own fault and folly that he did not thereby expressly provide against contingencies, such as "act of God" or unavoidable accident, and exempt himself from responsibility in certain events. *Bunn v. Prather*, 21 Ill. 217, 218 (1859); *Chitty on Contracts*, 568; *Steel v. Buck*, 61 Ill. 343, 349-351 (1871); *Summers v. Hibbard, Spencer, Bartlett Co.*, 153 Ill. 102, 110-111 (1894); *Schwartz v. Saunders*, 46 Ill. 18, 22 (1867); *McWilliams v. Eldred Drainage and Levee District*, 229 Ill. App. 91, 94 (1923); *Bacon v. Cobb*, 45 Ill. 47, 52-53 (1867); *Tartt v. Ramey*, 158 Ill. App. 468, 472 (1910); *Dean v. Lowey*, 50 Ill. App. 254, 257 (1893); *Platt v. Fischer*, 285 Ill. App. 110, 118 (1936).

In *Steele v. Buck*, 61 Ill. 343 (1871), where a vessel was chartered for a specified time, at a fixed price, under a written contract, and a bond with security given, conditioned for the payment of the price, and for the return of the vessel at the time named "in as tight, staunch and good condition as she now is, reasonable wear and tear excepted", and before the time for her return the vessel was destroyed in Lake Michigan in a gale by the "act of God", through no fault or negligence whatever, the bailee and his surety were liable upon their bond, and had to respond in damages to the owner of the vessel for not returning her according to the terms of their obligation. The Court said (at page 346 et seq.):

"The principle that lies at the foundation of the series of authorities. English and American, on this question, is, that *the party must perform his contract, and if loss occurs by inevitable accident, the law will let it rest upon the party who has contracted that he will bear it.*

"The rule is a just one, and has its foundation in reason, for, if he did not intend to bear the loss, it is natural to presume that he would have stipulated against it. It tends to promote justice by regarding the sanctity of contracts. * * *

"A distinction has been taken between implied contracts, or such as the law raises, and express contracts. *The performance of duties implied by law may be excused when performance becomes impossible by inevitable accident, but a duty or charge created by the express terms of an agreement may not be so excused.* * * *

"The reason given for the rule is, that when, if an event happens which will occasion loss to one or the other contracting parties, yet *the party who contracts that the event shall not happen, although he may be unable to perform his contract by reason of the act of God, he shall stand the risk and make good the loss. The party contracting assumes the responsibility for the consequences that may follow, if, for any cause whatever, he may be unable to perform his contract. He is an insurer to the extent of making good the loss.*

"The covenant in the bond declared on is of this character. It is absolute in its terms. It is a positive undertaking by Vogell and Crandall to restore the propeller at the end of the season for which it was hired notwithstanding it might be destroyed by the perils of the sea.

"We are at a loss to understand what is wanting to make this an express covenant to re-deliver the propeller at the end of the navigation season, even to making the charterers insurers against the perils of the

sea. * * * No other construction can reasonably be given to it, than that it was an absolute undertaking on the part of the appellant Steele, that the charterers should return the propeller at the end of the navigation season, notwithstanding the perils of the sea. *His obligation was absolute, that they should perform that covenant in the charter-party.* * * * *The parties did not provide, by their contract, for any excuse in case of the destruction of the propeller by reason of any accident arising from inevitable necessity and the law will not supply the omission for the contracting party.* Having failed to make provision for their protection in case of disaster, *the parties cannot now set up, as an excuse for the non-compliance with the express terms of the bond, that the propeller was destroyed by the perils of the sea, and the evidence as to its destruction was properly rejected.*" (Emphasis supplied.)

Agreements exculpating a party from his own negligence are not contrary to public policy and have been uniformly upheld. *Russell v. Shell Oil Co.*, 339 Ill. App. 168, 172 (1949); *Ingram v. New York Central R. Co.*, 30 Ill. App. 2d 455, 457 (1961); *Haynes v. Montgomery Ward & Co.*, 47 Ill. App. 2d 340, 346 (1964); *Jackson v. First National Bank of Lake Forest*, 415 Ill. 453 (1953); *Bounouglas v. Republic Steel Corp.*, 7th Cir. 277 Fed. 2d 726, 734 (1960); *De Tienne v. S. N. Nielsen Co.*, 45 Ill. App. 2d 231, 233 (1963); *Northern States Co., Inc. v. A. Finkl & Sons Co.*, 8 Ill. App. 2d 419, 422 (1956); *Patent Scaffolding Co., Inc. v. Standard Oil Co.*, 68 Ill. App. 2d 29, 41 (1966); *Shell Oil Co. v. Hercules Construction Co.*, 74 Ill. App. 166, 171 (1966); *Newberg Construction Co. v. Fischbach, Moore & Morrissey, Inc.*, 46 Ill. App. 2d 238, 246 (1964); *Meeks v. George A. Fuller Co.*, 40 Ill. App. 2d 172, 178 (1963); *Moroni v. Intrusion-Prepakt, Inc.*, 24 Ill. App. 2d 534, 542 (1960); *Chicago & N. W. R. Co. v. Chicago Packaged Fuel Co.*, 7th Cir. 1950, 183 Fed. 2d 630, 632; *Spurr v. Acme Steel Co.*, D. C. N. D. Ill. 1964, 238 Fed. Supp. 606, 610; *Insurance Company of North America v. Elgin, Joliet & E. R. Co.*, 7th Cir. 1956, 229 Fed. 2d 705, 712.

The wisdom, fairness or folly of a contract made between parties fully competent to contract, and based upon a proper consideration, is not a matter of concern to a court where no fraud or overreaching is claimed. The courts cannot relieve parties from their own imprudence in taking undue risks. *State Toll Highway Commission v. M. J. Boyle & Co.*, 38 Ill. App. 38, 51-52 (1962); *Stipanowich v. Sleeth*, 349 Ill. 98 (1932); *Green v. Ashland Sixty-Third State Bank*, 346 Ill. 174, 183 (1931); *Godberson v. Handke*, 345 Ill. App. 505 (1952); *Hall v. Wilson*, 277 Ill. App. 601, 604 (1934); *Weiland Tool & Mfg. Co. v. Whitney*, 40 Ill. App. 2d 70 (1963).

The courts will uphold and enforce contracts of the parties, and will carry out their intentions, even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained. *Bethlehem Steel Co. v. City of Chicago*, 234 Fed. Supp. 726, 731 (1964), affirmed 350 Fed. 2d 649, 651 (1965). There a structural steel erection contract provision for \$1,000 per day liquidated damages for delay was held reasonable and enforceable by the city against the contractor, in the amount of \$52,000 for 52 days' delay, regardless of the fact that the South Route Superhighway route was timely opened. On appeal, the Court held that the contractor sought to rewrite the contract and relieve itself from the stipulated delivery dates and the liquidated damages, and that this it could not do. With like reason, the contractor in the matter before us, there being no ambiguity in the applicable provisions of the contract, ought to be held strictly accountable for all of the questioned expenses.

In our opinion, all of the enclosed claims of the Duncan Parking Meter Maintenance Company were properly disallowed by the Bureau of Parking and, under the Contract Documents, are the obligation of the Contractor and not of the City, for the reason that all the work performed falls within the terms of the contract as above set forth and is not to be considered extra work or extraordinary work occasioned by the heavy snowfall conditions in question, as "an act of God", excusing the contractor from this expense, or requiring payment by the City for said billing.

Section C. PURCHASING AGENT

HIRING POWERS

(*Purchasing Agent—J. E. S.—July 7, 1961*)

In regard to your recent communication you ask our opinion as to the legality of the above cited professional engineering proposal, dated March 24, 1961, and whether same contravenes the ordinance of 1954 (C. J. December 9, 1954, pp. 8749-50) relative thereto. We note that said proposal refers and is affected by ordinances of the City Council passed September 18, 1952, pp. 3160-61, and March 14, 1957, p. 4369. For purposes of our discussion these ordinances will hereafter be referred to as the ordinances of 1952, 1954 and 1957.

Briefly, our examination of the ordinance of 1952 indicated that same was passed in connection with the issuance of revenue bonds relative to the City Parking Facilities Program and provided under Section 7.02 of Article VII thereof, at the page above cited, that an *Independent Engineer* experienced in the field of parking motor vehicles, "Shall be appointed by the Mayor subject to the approval of the City Council." The section referred to provided further that the Independent Engineer was to perform certain services enumerated therein, such as, inspecting parking facilities, making reports thereon, advising and recommending and preparing a Recommended Budget.

With respect to the ordinances of 1954 and 1957, both being in connection with the issuance of revenue bonds for the Chicago Calumet Skyway Toll Bridge, each under respective Sections 7.03, Articles VII, provided at the above cited pages thereof, that a Consulting Engineer shall be employed and that, pursuant to the 1954 ordinance, "Such Consulting Engineer shall be appointed by the Mayor subject to the approval of the City Council." The ordinance of 1957 relating to said Engineer provided "Such Consulting Engineer shall be duly appointed by law." Other than this change in wording both sections relating to the Consulting Engineer were identical and each enumerated the specific services to be rendered by such Engineer as follows:

"* * * Said Consulting Engineer shall inspect the bridge, make reports thereon, and advise and make recommendations to the City in connection with the operation thereof and shall prepare a recommended budget for operation and maintenance expenses of the Bridge. * * *"

1. The problem to be resolved is whether the ordinances of 1952 and 1954, requiring the employment of the Independent Engineer and Consulting Engineer thereunder by the appointment of the Mayor, subject to the approval of the City Council, precludes the Purchasing Agent from employing same, pursuant to the provisions of Section 22A-4, Chapter 24 of the Ill. Rev. Stats. of 1959, otherwise known as the Municipal Purchasing Act.

Under Section 22A-15 thereof we find at paragraph 2 therein the following:

"22A-15 * * * The Purchasing Agent shall: * * * (b) constitute the *sole agent* of the municipality in contracting for labor, materials, *services* or work * * *" (Emphasis added).

It is the purpose of Article 22A of the Municipal Purchasing Act, cited above, to promote the establishment of centralized systems for the efficient and economical operation of municipalities in the purchase of and contracting

for services, supplies and materials. We do not believe that it was intended that the functions of the Purchasing Agent, as heretofore established, should be repealed by ordinances of the City Council.

Haffner et al. v. Director of Public Safety of Lawrence, et al., 329 Mass. 709, 110 N. E. 2nd 369, 372.

In view of the above cited Municipal Purchasing Act, it is our opinion that the proposed contract does not contravene the revenue bond ordinances of 1952, 1954 or 1957, and that the proposed contract herein may be awarded by the Purchasing Agent under the provisions of Section 22A-4 of the Municipal Purchasing Act, subject to usual procedural requirements.

SALE OF OBSOLETE EQUIPMENT

(Purchasing Agent—R. F. S.—July 28, 1961)

In response to your letter of July 14, 1961, concerning the manner in which the sale of "scrap and obsolete equipment" should be treated in view of the new Retailer's Occupation Tax, I submit the following.

A "sale at retail" is defined in Chapter 120-Section 440 of the Illinois Revised Statutes as follows:

"Any transfer of the ownership of or title to tangible personal property to a purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration."

Relating this definition to your inquiry Mr. Ward, it is our opinion that sales of materials and scrap to scrap dealers who in turn sell to mills, do not come within the term "sale at retail" and therefore the City would be under no duty to collect the retailer's occupation tax.

In connection with the sale of used and obsolete equipment, it would appear at first blush that these sales would come within the definition of a sale at retail. However since rule three of the published Rules and Regulations of the Department of Revenue of the State of Illinois reads as follows:

"Since the Act does not impose a tax upon persons who are not engaged in the business of selling tangible personal property, persons who make isolated or occasional sales thereof do not incur tax liability. For example, if a retailer sells tangible personal property, such as machinery or other capital assets, which he has used in his business and no longer needs, and which he does not otherwise engage in selling, he does not incur retailer's occupation tax liability when selling such tangible personal property even if the sales are at retail and even if he may be required to make a considerable number of such sales in order to dispose of such tangible personal property, because such sales are isolated or occasional and do not constitute a business of selling tangible personal property at retail."

There is no duty on the part of the City to collect the retailer's occupation tax on the sale of this equipment.

Briefly stated the answer to your question is that *there is no requirement to collect* a tax on sales of scrap and obsolete equipment.

Trusting that this letter satisfactorily answers your inquiries, I am,

AUTHORITY TO LEASE

(Commissioner, Department of Streets and Sanitation—J. C. M.—September 18, 1961)

In reply to your inquiry of August 22, 1961, re Rental and Maintenance of Refuse Collection Equipment, it is our opinion:

1. That the Purchasing Agent under the Purchasing Act (Chap. 24, Section 22A-3) has authority to lease personal property. If the amount involved is in excess of \$2500, competitive bidding is required. If the term of the lease exceeds one year, a provision for payments during subsequent years shall be subject to the annual appropriation ordinance.

2. The same requirements would apply to maintenance contracts; which the Purchasing Agent has authority to enter into.

CONTROL OVER CORPORATE PERSONAL PROPERTY

(Purchasing Agent—C. F. V.—November 13, 1961)

Your letter dated November 1st requests our opinion regarding proper departmental jurisdiction over disposition of weapons, considered obsolete, stored in the Police Department Arsenal.

Transmitted with your letter was a memorandum from the arsenal custodian to the Director of Central Services Division, the last paragraph of which indicates that the subject weapons are City of Chicago and Police Department property. On this presumption and provided that these weapons are not property seized by the Police Department for unlawful possession or use, it is our opinion that exclusive authority to dispose of same is reposed in the Purchasing Agent, not the Arsenal Custodian.

Section 59-4, Chapter 24, Illinois Revised Statutes, 1959, providing for disposition of corporate personal property, subjects procedure for same to the provisions of the Municipal Purchasing Act (Article 22A, Chapter 24); section 15 of the Purchasing Act specifically includes authority over such property: "The Purchasing Agent shall—(b) constitute the sole agent of the municipality in contracting for . . . sale of personal property—[and] (i)—sell or dispose of such materials, supplies or equipment as may become surplus, obsolete or unusable—".

CONTRACTOR-PURCHASING AGENT RELATIONSHIP

(City Architect—J. G. O.—January 2, 1962)

We have reviewed your letter of December 19, 1961, in which you advised us of certain damages to the subject property during the course of construction because of the failure of the contractor to provide watchman service. We believe that the contractor should be required to reimburse the City for any and all damages which arose out of the failure to provide watchman service.

You ask whether the Purchasing Agent is the medium through which your communications to contractors must be channeled to be valid. It is not necessary that usual communications in the course of construction be channeled through the Purchasing Agent, but whenever a contractor is not performing in accordance with the specifications, the Purchasing Agent, being the sole contracting agent for the City, is the only one who can hold a contractor in default and too, said Purchasing Agent should be advised whenever there is any major dispute arising under the subject contract.

PROCEDURE CHANGE

(Purchasing Agent—J. C. M.—November 20, 1962)

We are in receipt of a copy of a letter dated October 10, 1962 addressed to you by George DeMent, Commissioner of Public Works, in connection with the Change Order due to unusual circumstances encountered in connection with the sinking of Shaft C-4 at Chicago Avenue and Lake Michigan. In connection with the plans and specifications, there was submitted to the contractor Drawing 102A-S4, depicting the sub-strata conditions at the site of Shaft C-4. The drawing indicated fill material to Elevation -10, then a 9.5-foot stratum of lake sand and gravel to Elevation -19.5, then a 30.5-foot stratum of plastic clay to Elevation -50, and then a stratum of stiff clay.

When the contractor installed Shaft C-1 in the vicinity of Wilson Avenue and Lake Michigan, which was a similar type of shaft as Shaft C-4, no particular difficulties were encountered except that a considerable amount of grout had to be used to seal the shaft against seepage.

The contractor, in attempting to sink Shaft C-4 found it impossible to drive a water tight steel sheeting coffer-dam. In the course of said excavation, the contractor encountered at Elevation -20 large quarry stones in the plastic clay stratum, which stones were not depicted in the sub-strata drawing furnished by the City. A large quarry stone of approximately 2' x 3' x 4' was encountered on the sheet pile perimeter, the top of which stone was at approximately Elevation -22. This stone had ruptured the interlock of the sheet steel piling and continued excavation revealed that as a consequence of the breach in the coffer-dam and the unstable nature of the sub-strata conditions, large volumes of water were flowing into the shaft. The water carried with it quantities of sand and silt sufficient to cause noticeable settlement in areas adjacent to the shaft and Lake Shore Drive. All efforts of the contractor to halt the flow of water, sand and silt proved to be of no avail and as an emergency measure in order to avoid damage to adjacent property by further settlement, the contractor filled the shaft with water to equalize hydro-static pressure. As a consequence, the contractor was prevented from continuing or completing the construction of Shaft C-4 in accordance with the methods and procedure originally contemplated and proposed by the contractor and approved by the City.

The firm of Spencer, White & Prentis of New York, experts in the field of excavations, and who had rendered valuable service to the City of Chicago in connection with the construction of the Chicago Subway under the United States Post Office Building were consulted by the contractor and the City as to an alternate plan of procedure. It was determined that the firm of Spencer, White & Prentis be employed by the contractor with the approval of the Bureau of Engineering of the City to complete a portion of the shaft and connecting tunnel extending through water bearing material using the compressed air method. Spencer, White & Prentis started work on June 17, 1957 and by early November of that year had completed the excavation and concrete lining of the shaft to 62 feet below lake level and the excavation and lining of the connecting tunnel. Spencer, White & Prentis were paid \$272,286.08 by the contractor for this work. Attached to your letter is a copy of

the contractor's request for extra payment in the amount of \$244,590.28 for this extra work and a copy of a statement by the contractor giving a breakdown of the costs entering into this claim. The Commissioner of Public Works advises that these costs have been carefully checked by his department and found to be fair and reasonable. In his letter, Mr. DeMent states: "In considering this claim, it should be remembered that the method adopted by the contractor in using compressed air is actually an alternate to the use of special grout as provided for in the contract at the price of \$26.80 per barrel. It is our opinion based on our previous experience with Shaft C-1 that the method adopted by the contractor was no more costly than the use of special cement grout in overcoming the difficulty."

It appears to us that even though the contractor could have made borings or tests in the vicinity of Shaft C-4 that such borings or tests would not have disclosed the presence of the large boulder described above, as that boulder was encountered on the sheet pile perimeter, when the sheet pile was being driven into position. It further appears to us that neither the contractor nor the City of Chicago or any of its agencies had any knowledge of the presence of such a large boulder in or near Lake Michigan. The rupturing of the steel sheet pile created an emergency that could have resulted in the settlement of Lake Shore Drive and its possible destruction.

It further appears that the use of the alternate method, the employment of Spencer, White & Prentiss, the furnishing of the alternate plan to the City, the approval of the plan, and the supervision of the work by members of the Bureau of Engineering indicate a complete accord on the part of the City that this alternate plan was one of necessity in order to (1) eliminate the danger of considerable damage due to settlement and (2) to complete the shaft and the tunnels in connection therewith. It further appears that in approving this alternate plan, the City officials were of the opinion that the additional cost by the use of air pressure would be offset by the tremendous amount of grout that would be required by any other method.

While we are cognizant of certain provisions in the contract relative to soil information (see page B2, Articles, 3, 4, 5 and 6), it is our opinion that these provisions are not controlling under the circumstances set forth above. We are of the opinion that the presence of that boulder, which was the cause of the trouble, could not be reasonably foreseen either by the contractor or the officials of the City of Chicago.

In our conferences on this matter, we have gone over all of the details relating to the performance of this contractor. The contractor and his attorneys have indicated that in the event of litigation other substantial claims will be urged such as additional rock excavation, additional concrete, overbreakage and the unreasonable estimate of water to be pumped out of the tunnels under the contract and other matters.

We are of the opinion that this change order should be allowed and that the contractor should be reimbursed in the amount of \$244,590.28 for this extra work provided that the acceptance of said sum shall be the final payment under the contract and that the contractor execute a general and special release to be prepared by the Corporation Counsel releasing the City of Chicago from any and all other claims that the contractor has or may assert.

JURISDICTION OVER DEMOLITION CONTRACT

(*Purchasing Agent—S. R. D.—December 7, 1962*)

We acknowledge receipt of your letter of November 8, 1962, in which you request an opinion as to whether the letting of contracts for the demolition of buildings on Urban Renewal property is under the jurisdiction of the Purchasing Agent of the City of Chicago and, if so, if Section 13 of the Urban Renewal Consolidation Act (Ill. Revised Stat. 1961, Chap. 67½, Par. 91.113) or Section 8-10-13 of the Purchasing Act (Ill. Revised Stat. 1961, Chap. 24, Par. 8-10-13) applies.

In our opinion, the Department of Urban Renewal is a department of the City of Chicago. Section 3-7-2 of the Illinois Municipal Code (Ill. Revised Stat. 1961, Chap. 24, Par. 3-7-2) provides that all officers of any city shall be appointed by the Mayor by and with the advice and consent of the City Council. Section 5 of the Urban Renewal Consolidation Act (Ill. Revised Stat. 1961, Chap. 67½, Par. 91.105) provides that the "presiding officer [mayor] of such municipality in which a Department of Urban Renewal is established, shall appoint, with the approval of the governing body [city council], five members to act as a Department of Urban Renewal, hereinafter referred to as the 'Department'." The mere fact that the department head consists of a chairman and four members does not nullify the fact that the department is a department of the City of Chicago. *The Peo. ex. rel. Adamowski v. Wilson* (1960), 20 Ill. 2d 568. The Department of Urban Renewal, being a department of the City of Chicago, is subject to the provisions of the Municipal Purchasing Act (Ill. Revised Stat. 1961, Chap. 24, Par. 8-10-3).

With the Department of Urban Renewal being subject to the Purchasing Act, the next question is whether contracts for the demolition of buildings on property of Urban Renewal is subject to the Purchasing Act. Section 8-10-3 of the Purchasing Act (Ill. Revised Stat. 1961, Chap. 24, Par. 8-10-3) provides in part as follows:

"* * * [A]ll purchase orders for contracts of whatever nature, for labor, services or work, * * * involving amounts in excess of \$2,500, made by or on behalf of any such municipality, shall be let by free and open competitive bidding * * * to the lowest responsible bidder, * * *."

Contracts for the demolition of buildings are contracts "for labor, services or work" and therefore come within the provisions of the Purchasing Act. Therefore, jurisdiction for the demolition of buildings on property of Urban Renewal is in the Purchasing Agent of the City of Chicago.

The remaining question is whether Section 13 of the Urban Renewal Consolidation Act or Section 8-10-13 of the Purchasing Act applies in contracts let by the Purchasing Agent for the demolition of buildings on property of Urban Renewal. The Purchasing Act is complete within itself and, therefore, the Purchasing Agent is bound by its provisions and none other. *Aaron & Bros. v. McKibbin* (1946), 392 Ill. 558; *The People v. City of Chicago* (1932), 349 Ill. 304, 321-322.

Summarizing the foregoing, it is our opinion that contracts for the demolition of buildings on property of Urban Renewal is under the jurisdiction of the Purchasing Agent of the City of Chicago, who is bound by the provisions of the Purchasing Act, including Section 8-10-13 thereof.

REJECTION BY PURCHASING AGENT

(Purchasing Agent—F. O.—June 28, 1963)

Returned herewith, pursuant to your request, is documentation heretofore submitted to this department together with your complete contract file No. 21-63-27, all relative to the above cited contract, and the questions you pose for our consideration in connection therewith.

You request (1) our interpretation of the detailed specification with regard to whether the subject plastic litter basket meets the standards established therefor and, (2) whether the test reports of your Engineer of Tests can be used as grounds for rejection?

With respect to your first question, we believe that in this instance same would constitute a technical or non-legal determination to be resolved by the technical people assigned to conduct the tests. However, our perusal of the report would seem to clearly indicate a failure with respect to meeting requirements among others (See page 2 of Purchasing Agent Test Report re Combustibility).

With reference to your second question, your attention is invited to page 1 of the contract documents, under General Conditions thereof:

"INSPECTION AND RESPONSIBILITY

"The City shall have a right to inspect, by its authorized representatives, any material as herein specified. * * *"

"REJECTION OF MATERIAL OR SERVICES

"Equipment, supplies or services that may fail to comply with the specifications herein as regards design, material or workmanship, are subject to rejection, and may, at the option of the Purchasing Agent, be rejected."

In view of the foregoing provision, it is the opinion of this department that the Purchasing Agent, *at his option*, may reject the subject litter basket, for failure of same to meet the requirements established therefor and as determined by the Engineer of Tests.

We shall be pleased to be of any further assistance which may be necessary in this matter.

ORDINANCE IN CONFLICT WITH STATUTE

(Purchasing Agent—R. N.—April 29, 1964)

You have asked this department to advise you as to your responsibilities for the proper functioning of your department in circumstances where the governing provisions of the city ordinance and the state statute differ.

The Municipal Purchasing Act for cities of 500,000 or more population is now contained in Division 10 of Article 8 of the Illinois Municipal Code (I. R. S. Ch. 24, secs. 8-10-1 to 8-10-23). In enumerating the powers and duties of municipalities, section 8-10-2 states:

"In addition to all the rights, powers, privileges, duties and obligations conferred thereon elsewhere in this division or any other Acts,

all cities of 500,000 or more population shall have the rights, powers and privileges and *shall be subject to the duties and obligations conferred thereon by this Division 10.*" (Italics ours.)

By precise language the municipality is thus given power to act only within the scope of the provisions of the statute. No ordinance which contravenes or differs from the procedure set forth in the statute would be effective or binding on the municipality or its officers.

In general, it is established law that municipal regulations yield to the general laws of the state on the same subject when there is a conflict between them (See Opinions of the Corporation Counsel, vol. 16, p. 531); that a city ordinance is void if it conflicts with a state statute (vol. 18, p. 17 and opinions therein cited); that specific enactments of the legislature supersede city ordinances on the same subject (vol. 18, p. 22). In the particular area of the Purchasing Act, the powers of the municipality are specifically limited to those "conferred . . . by this Division 10".

Your responsibility, therefore, is to conform to the procedure set by statute without regard to the provisions of the ordinance which conflict therewith. That such inconsistencies may be cleared away, this department will prepare an ordinance revising those conflicting provisions of the Code upon submission by you of an informal memorandum of those sections of the Code which should be amended as a matter either of law or of policy.

HANDLING OF BIDS

(Corporation Counsel, City of Detroit—J. C. M.—May 13, 1964)

In reply to your letter of May 8, 1964, relating to contracts to be entered into by public bidding, be advised that the contracts of the City of Chicago are authorized and regulated by the purchasing and public works contracts in cities of more than 500,000 population known as the Purchasing Act (Chapter 24, Section 8-10-1 of the Illinois Revised Statutes, 1963). The provision controlling is as follows:

Section 8-10-3.

"Except as otherwise herein provided, all purchase orders or contracts of whatever nature, for labor, services or work, the purchase, lease, or sale of personal property, materials, equipment or supplies, involving amounts in excess of \$2,500, made by or on behalf of any such municipality, shall be let by free and open competitive bidding after advertisement, to the lowest responsible bidder, or in the appropriate instance, to the highest responsible bidder, depending upon whether such municipality is to expend or to receive money. All such purchase orders or contracts, as defined above, which shall involve amounts of \$2,500, or less, shall be let in the manner described above whenever practicable, except that such purchase orders or contracts may be let in the open market in a manner calculated to insure the best interests of the public, after solicitation of bids by mail, telephone, or otherwise. The provisions of this section are subject to any contrary provision contained in 'An Act concerning the use of Illinois mined coal in certain plants and institutions'."

There is also a provision for allowing contracts without competitive bidding where such contracts are for the services of individuals possessing a high degree of professional skill where the ability or fitness of the individual plays an important part, contracts for printing of finance committee pamphlets, comptroller's estimates, and departmental reports, contracts for the printing or engraving of bonds, water certificates, tax warrants and the like.

Under the procedure adopted by the City of Chicago, the contract documents and specifications pertaining thereto are referred to in an advertisement soliciting bids. Copies of the contract documents are available to prospective bidders. The advertisement sets forth the time and place of the opening of sealed bids. These bids are opened by the Purchasing Agent in public and recorded in his office in a proper journal. A deposit of a certified check of 10% of the bid is required to be accompanied with the bid. The contract and advertisement usually provides that the Purchasing Agent shall have 60 days within which to determine who is the lowest responsible bidder and within that time he notifies that party and upon acceptance and execution of the contract documents the Purchasing Agent returns the checks of the unsuccessful bidders. If the lowest responsible bidder fails or refuses to enter into the contract, then we forfeit his deposit and the Purchasing Agent may inform the next responsible bidder or throw out all the bids and readvertise. In connection with the execution of such contract, the contractor must furnish the City with a proper Indemnity Bond, which is equal to the value of the contract.

Prior to the adoption of the Purchasing Act, all contracts were submitted to the City Council for acceptance or rejection. In line with streamlining the government facilities, the legislature made the Purchasing Agent an officer of the municipality and his term is fixed at four years. He is appointed by the Mayor by and with the consent of the City Council. The Purchasing Agent now has complete control over the letting of contracts under the Purchasing Act and the City Council has no authority in connection therewith. The contract documents must be signed, in addition to the Purchasing Agent, by the City Comptroller and the Mayor, after the same has been approved by the Corporation Counsel as to form and legality. Under the present procedures, it is possible for the Purchasing Agent to advertise for a minimum of 15 days in a legal publication and issue and execute a contract within 30 days thereafter, if desired.

Hoping that these facts will be of some help to you in your problem, I am

REJECTION OF BIDS BY PURCHASING AGENT

(Commissioner of Public Works—M. E. A. & S. R. D.—January 29, 1965)

Reference is made to your letter of January 19, 1965, in which you asked our opinion as to which of two designated bidders for the contract for the above-described construction is the low bidder.

The Facts.

On December 17, 1964, and December 24, 1964, an advertisement appeared in Chicago's American stating that bid opening on the above-described construction would take place on January 8, 1965.

On January 5, 1965, Addendum No. 3 was mailed by the Purchasing Department to those firms which had taken out specifications up to that date. One of these firms was Kenny Construction Company, hereinafter referred to as "Kenny". Consolidated Construction Company, Inc., hereinafter referred to as "Consolidated", did not appear on the list of those firms which had taken out specifications up to that date and Consolidated was not mailed Addendum No. 3. Addendum No. 3 changed the quantity of Item No. 5 (Reinforced Bars) from 795,000 lbs. to 595,000 lbs. Addendum No. 3 was placed in the specifications tendered to firms requesting the same subsequent to the January 5, 1965 mailing.

There is strong evidence that Addendum No. 3 was never tendered to Consolidated. Although the log book of the Purchasing Department indicates that Consolidated "took out specifications after the mailing of Addendum No. 3", the Purchasing Department reports that "it is possible that specifications without Addendum No. 3 could have been given to (Consolidated) . . . on December 31, January 4, or early in the day of January 5, without an entry being made in the log book at the moment of giving . . . and no addendum would have been mailed since the name did not appear on the log list used for mailing Addendum No. 3".

On January 8, 1965, the Purchasing Department received and opened fifteen bids for the contract in question. Kenny was the apparent low bidder at \$1,037,660.50. Consolidated was the apparent second low bidder at \$1,042,023.00. Item No. 5 was changed by Kenny in accordance with Addendum No. 3 and appeared as 595,000 lbs. at a unit price of \$.08 and a total price of \$47,600.00. Item No. 5 was not changed by Consolidated in accordance with Addendum No. 3 and appeared at 795,000 lbs. at a unit price of \$.11 and a total price of \$87,450.00. If Item No. 5 of Consolidated were amended to 595,000 lbs. at a unit price of \$.11, the total price for amended Item No. 5 would be \$65,450.00. This would reduce Consolidated's contract bid to \$1,019,993.00, a figure lower than the apparent low bid of Kenny.

Opinion.

It is our opinion that for the Purchasing Department or the Commissioner of Public Works to amend the sealed bid of Consolidated to conform with Addendum No. 3 would be unfair to Kenny and without lawful authority. It cannot be assumed that Consolidated's Unit Price of \$.11 would have remained constant had the quantity of Item No. 5 been reduced by 200,000 lbs.

It is our further opinion that to hold Consolidated to a \$1,042,023.00 apparent second low bid would be unfair to that firm in that the evidence indicates a strong possibility that Consolidated was never tendered Addendum No. 3 by the Purchasing Department.

For these reasons, it is our opinion that the Purchasing Agent should exercise his option under Paragraph 11 of the specifications. Paragraph 11 appears in the specifications tendered to both Kenny and Consolidated as follows:

"11. *Rejection of Proposals.* Any proposal not in conformity with the requirements of the City as herein stated may be rejected. The Purchasing Agent reserves the right to reject any or all proposals, and to disregard any informalities in the proposals and bidding, when in the opinion of the Purchasing Agent the best interest of the City will be served by such action."

In our opinion the best interest of the City will be served if the Purchasing Agent rejects all proposals for the contract in question as received on January 8, 1965. New bids should be solicited for this contract.

AUTHORITY UNDER EMERGENCY CONTRACTS

(Purchasing Agent—C. F.—April 29, 1966)

Pursuant to your recent request, returned herewith is the above-cited change order without approval of this office.

Our approval is withheld since the structure in question was not included in the original contract cited above. It is our opinion that this contract may not be modified so as to include additional independent, unrelated work without compliance with the advertising requirements of Chapter 24, Section 8-10-7 of the Illinois Revised Statutes (1965).

However, bids for demolishing the building in question, at 1113 West Noble Street, were taken on an emergency basis, after a fire left the structure in a hazardous condition, as described in the attached communications. The low bidder was selected to raze the dangerous remaining part of the four-story building at a cost of \$3,700.00.

We suggest that the Purchasing Agent, under such a situation, may justifiably have the demolition performed under the "Emergency Contracts" provisions contained in Chapter 24, Section 8-10-5, Illinois Revised Statutes where the amount involved thereof is not in excess of \$10,000.00.

CHAPTER XIII—PUBLIC IMPROVEMENTS

Section A. AIRPORTS

LANDING FEES

(Acting Commissioner of Public Works—J. E. S.—March 24, 1961)

In your letter of recent date a request was made for an opinion of the contention proffered by United Air Lines, relative to the assessment of landing fees for their flight number 905 operating at Midway Airport each Saturday.

In the enclosures forwarded with your letter the Airline seemingly adopts the position that they are not required to pay a landing fee for said flight since it was not scheduled to operate on the first business day of the month.

The determination of what constitutes a fee landing is generally predicated upon the current official schedule of the line on file with the Civil Aeronautics Board.

The assessment of landing fees by the City is made on a month to month breakdown of said schedule, and consequently a monthly date certain, i.e., the first business day of the month, is established from which to toll the assessable period. Flights appearing on the schedule on that date and which will operate during the assessable period, are subject to assessment regardless of date or frequency of operation.

The stipulation contained in the United Air Lines letter dated July 16, 1954, should not be accepted as a condition precedent to payment.

It is the opinion of this office that United Air Lines is required to pay a landing fee for subject flight since, as stated heretofore, the flight did appear on their schedule on the first business day of the month.

FEDERAL RIGHTS AT O'HARE FIELD

(Commissioner of Aviation—J. E. S.—September 21, 1961)

Your letter of September 12, 1961, requested this office to advise your department and the Commissioner of Public Works as to the legal impact of the above cited Regulation. Subject Regulation, which became effective on 15 July 1961, briefly sets out that all intended construction on and around airports, if not otherwise shielded, pursuant to Part 626.9 (b) (1), must be coordinated with the Federal Aviation Agency by use of its form FAA-117. In like vein is the amendment to Part 625.3 of said Regulation.

In answer to your question, the legal impact on the City of Chicago, in complying with said Part, is nil. It goes without saying, however, that a failure to comply would most seriously affect airport utilization, in the first instance, and any subsequent project application for Federal funds in the second instance, as examples. The purpose of the Regulation is only to assure

that structures hazardous to the operation of aircraft, both on and around an airport, are not erected.

Part 626.3 (a) of subject Regulation states that same does not apply to structures in existence on the effective date (July 15, 1961) except with respect to any alteration to said structures after the effective date.

It would be our opinion, therefore, that F. A. A. 117 need not be submitted for structures on O'Hare Field or other airports which are in existence, but those structures, such as may be erected in the future, must be reviewed by the F. A. A., pursuant to the Regulation.

AIRPORTS—USE OF SPACE

(Commissioner, Department of Aviation—C. F. V.—January 11, 1962)

Your letter of December 29, 1961 requests our opinion concerning the installation by lessee airline companies of vending machines for food and beverage service to employees of certain airlines in the new terminal facilities. Your letter indicates that the machines will be placed in the airlines' private areas for use by the particular airlines' employees only. Through conversation with members of your staff, it has been determined that "private areas" refers to the airlines' administrative offices in the concourse building and/or other areas within the terminal building which are restricted to the employees of the particular airline.

Your letter tenders three specific questions:

(1) Whether or not the installation of these vending machines conforms to the *Use of Space* (Section 2.03) provisions of the airline lease?

(2) Whether or not to permit said installation constitutes a violation of the exclusivity provisions of the City's lease with International Airport Restaurants Carson Pirie Scott and Co.?

(3) Whether or not the City may charge a percentage of gross receipts from the operation of said vending machines?

These questions are answered in order of presentation.

(1) It is our opinion that installation of food and beverage vending machines by airlines in their private areas for use by airline employees falls outside the scope of permissive uses of space under section 2.03 of Lease of Terminal Facilities. The pertinent language of Section 2.03 provides that use of leased space shall include: "(a) maintenance and operation, in connection with the conduct by Airline of air transportation, * * * of customer relations and waiting room facilities, reservations offices, *administrative offices, and locker, rest room and related facilities* in Airline's Operation Area Space, Airline's Mezzanine Area Space * * * (c) the maintenance and operation of facilities and equipment and carrying on of activities reasonably necessary or convenient in connection with the foregoing * * * (d) the carrying on of *other operations and activities reasonably necessary or convenient to the conduct by Airline of air transportation* * * *."

"The foregoing shall not permit the use of Airline's New Terminal Building Space for * * * public restaurants or *merchandising operations* or the conduct of any business separate from Airline's operations of an air transportation system." (Emphasis supplied.)

It is noted that permissive uses are initially enumerated; these enumerated uses are followed by general "catch-all" phrases such as "related fa-

cilities" and "other operations and activities reasonably necessary or convenient to the conduct by Airline of air transportation". General "catch-all" phrases when following enumerated uses are to be construed as referring only to those uses enumerated, provided that such is in conformity with the general purpose of the document construed as a whole. Here, however, even the general phrases are modified by and restricted to operations and activities "reasonably necessary or convenient to the conduct by Airline of air transportation".

It is submitted that food and beverage vending machines for employee use is not "reasonably *necessary*" for the conduct of an air transportation system; it is further submitted that the operation of said machines is not "reasonably convenient" to the business activity inasmuch as food and beverage service is explicitly provided for the special convenience of airline employees in Carson's lease (Section 12 (c)). Said lease requires that the restaurant concessionaire provide a cafeteria for "employees of Air Lines" on the lower level of Building No. 6.

Since the operation of vending machines does not fall within either the enumerated or general permissive uses of space, we believe that the final paragraph of the above quoted section 2.03 explicitly prohibits the contemplated use by proscribing airlines from "*merchandising operations* or the conduct of any business separate from Airline's operation of an air transportation system".

(2) It is our opinion that, if otherwise accomplished by amendment to the Airline's Lease of Terminal Facilities, the installation and operation of subject vending machines would not constitute a violation of Carson's exclusive rights by reason of the specific exception contained in paragraph 11 (b) of that agreement, provided that only non-alcoholic beverage is dispensed and that the food dispensed conforms to the restrictive definition of "food" therein specified. The last paragraph of said section 11 (b) reads as follows:

"Lessor reserves the right to grant to others than lessee the right to operate vending machines in the areas which are outside of the demised premises for the purpose of dispensing non-alcoholic beverages such as coffee, tea, milk and soft drinks, and miscellaneous sundry food items such as ice cream and candy, and also tobacco products, and any and all other non-food items, but not for the purpose of dispensing food items such as soup, pie, sandwiches, and other foods which normally constitute a substantial part of a meal."

(3) It is our opinion that, if airlines were permitted by amendment to its lease to contract for installation of subject vending machines, the City would be required to provide specifically for a charge on gross receipts from said operation in order to overcome the constraints on additional fees appearing in section 2.05 of the Lease of Terminal Facilities.

LANDING FEE EXEMPTIONS

(Commissioner of Aviation—J. E. S.—April 2, 1962)

Your recent letter requested that this office advise whether or not the City may waive landing and parking fees at Chicago's airports for aircraft operated by Southern Illinois University.

Under pertinent provisions of Chapter 37 of the Municipal Code of the City of Chicago, as passed September 27, 1961, public aircraft as defined in Section 6 of said ordinance, i.e., any aircraft owned by and used exclusively in the service of the United States Government of any State, territory or possession or of the United States or the District of Columbia are exempt from payment of fees. Additionally, exception is made to the extent that a

contract with the City covering all or part of the operation is in effect specifying a different rate.

Southern Illinois University was created under the provisions of an Act approved March 9, 1869, as subsequently amended. It is legislatively determined to be a body politic and corporate, operated by a Board of Trustees appointed by the Governor. As such it is a legislatively created public corporation of the State of Illinois. In essence, as in the case of the University of Illinois "it functions solely as an agency of the State for the purpose of the operation and administration of the University for the State." (*People ex rel. The Board of Trustees of the University of Illinois v. Barrett*, 1943. 382 Ill. 321, at page 343.)

As pointed out in an opinion of this office under date of January 30, 1962, concerning aircraft operated by the University of Illinois, it would be our opinion that aircraft operated by Southern Illinois University in connection with university matters would likewise be exempt from the payment of the afore-cited ordinance fees at Chicago's airports.

USE OF AIRPORT FOR NON-AVIATION PURPOSES

(Commissioner of Aviation—R. L. H.—April 2, 1962)

Your letter of March 27, 1962 requested our opinion as to whether you may consent to a non-aviation sub-lease of premises leased to the Flying Tiger Line, Inc. at Chicago-Midway Airport.

The land upon which Chicago Midway Airport is located was leased by the City of Chicago from the Chicago Board of Education by a 50 year lease effective January 1, 1931. Although this lease was subsequently amended in 1938 and in 1956, the basic terms of the original lease were never amended.

The terms of the said lease as amended pertinent to the question herein raised are:

"FIRST: The first party hereto, the Lessor, in consideration of the rents hereinafter reserved and of the covenants and agreements herein expressed on the part of the Second party, the Lessee, to be kept, performed and fulfilled, has devised and leased and by these presents does devise and lease unto the Lessee, *for the purpose of maintaining a municipal airport or landing field thereon and for no other purpose . . .*"

"FOURTH: As a further consideration for the leasing aforesaid, the said lessee hereby further covenants and agrees to and with the Lessor that said Parcel No. 1 will be used for the *purpose of maintaining a municipal airport or a landing field thereon*, including comforts and necessities of patrons and employees of Lessees, sub-lessees and occupants, incidental to the development and maintenance of a municipal airport or landing field *and for no other purposes*, and that Parcel No. 2 will be used for the purpose of extending runways and taxiways and to provide additional clear zones for planes at the airport and for no other purpose".

"SEVENTH: It is further commented and agreed, . . . that the said lessee shall not assign . . . in whole or in part . . . its interest . . . in the said demised premises, . . . or the buildings and improvements . . . situated thereon . . . to any assignee soever; provided, however, that *said lessee may sublet any part or any portion of the said demised premises for the uses and purposes herein set forth*, including comforts and necessities of patrons and employees of lessee, sub-lessees and occupants. *incidental to the development and maintenance of a municipal airport or landing field on said demised premises*, all subject to the terms and conditions of this lease".

Please note that the italics in the foregoing clauses have been done by our office for the purpose of clarification and accentuation.

Pursuant to the foregoing lease clauses which seem both clear and mandatory, it is our opinion that the premises at Chicago Midway Airport cannot be subleased for any purposes other than those which are incidental to an airport and landing field.

It is therefore our opinion that the sub-lease to non-aviation interests as contemplated in your letter would not be permissible without amendment of the original lease from the Chicago Board of Education to the City.

USE OF HANGAR SITE

(Commissioner, Department of Aviation—C. F. V.—April 2, 1962)

Your letter of January 22 requests our opinion as to whether or not the installation of vending machines for food and beverage service is properly within the permissible uses of space provisions of the following leases at O'Hare: Hangar and Hangar Site Lease, Joint Cargo Building and Site Lease, Cargo Building and Site Lease, and Fueling System Lease.

1) *Hangar and Hangar Site Lease*: Lessees are specifically authorized under Article I, Section 1.01(h) to maintain and operate "a private cafeteria, restaurant and other food and beverage preparing and dispensing facilities and equipment for the purpose of preparing and serving foods and beverages for consumption by Airline's employees and invitees and for consumption on aircraft . . . [but not for service to the public]". It is our opinion that food and beverage vending machines installed by lessees are authorized hereunder. We find no conflict between this authorization and the provisions of the lease with International Airports Restaurants-Carson Pirie Scott and Co. See section 32 (b) of the latter agreement.

2) *Joint Cargo Building and Site Lease; Cargo Building and Site Lease; and Fueling System Lease*: It is our opinion that the installation of vending machines for food and beverage service is not within the permissible uses of space by lessee under pertinent provisions of these three agreements—either expressly or impliedly as related to enumerated uses. See Section 1.02 of *Joint Cargo Building and Site Lease*; section 1.01 of *Cargo Building and Site Lease*; section 1.02 of *Fueling System Lease*.

We would further indicate that, as relates to food vending machines, the premises demised by the Joint Cargo and Cargo Building Leases, and certain premises in the Fueling System Lease appear to fall within the area of exclusive activity of Carson's agreement.

FEDERAL EXEMPTION FROM LANDING FEES

(Chairman, Subcommittee on Aviation and Leases, Committee on Finance—J. E. S.—May 28, 1962)

At a meeting of your Subcommittee held on May 28, this department was requested to advise whether landing fees at Chicago-O'Hare International Airport could be waived for aircraft

- 1) owned by the United States Government and assigned to the Civil Air Patrol;
- 2) owned privately by members of the Civil Air Patrol and bearing the CAP emblem;

under the provisions of the Airport Use Agreement in effect between the City of Chicago and the scheduled Airline signatories.

Answering 1) above, Section 2.01 of subject agreement pertinently provides that each separate landing at the airport of an aircraft operated by Airline or others, shall be a "fee landing" except that the "fee landing" shall not include the following:

(d) Any landing of aircraft operated by the United States Government or the Illinois National Guard if, and to the extent, the lease entered into between City and the United States, dated May 16, 1958, relating to the airport, shall remain in effect and under the terms and conditions thereof, such landing is to be without charge * * *.

Said lease in paragraph 1 (b) thereof provides that subject to the provisions contained in paragraph 3, which are not here pertinent, the City grants to the government the use, without cost to the government in common with others of the air field, for military aviation purposes, including the Air National Guard. It would, therefore, be our opinion that those government aircraft assigned to the Civil Air Patrol, when used for military aviation purposes, would, at this time, be included amongst those aircraft listed in the afore-cited paragraph (d).

Answering 2) above, paragraph 17.01 of said Use Agreement provides that the City shall charge the flight fee rate for each fee landing at the airport of aircraft, no matter by whom operated, except that in the case of non-commercial private aircraft City may establish and charge any other rate for all such aircraft provided that said rate shall not be less than 30¢ for each 1,000 lbs. of approved maximum landing weight of such aircraft. This minimum landing fee is presently established by ordinance.

Thus, it would be our opinion that in the absence of amendment to said use agreement those CAP aircraft which are privately owned, assumingly used for non-commercial purposes and not being aircraft operated by the government, would be subject to the payment of said ordinance fees.

HELICOPTER OPERATION

(City Manager, City of Norfolk—J. E. S.—October 25, 1962)

Your recent letter, addressed to the Honorable Richard J. Daley, Mayor, concerning a proposed traffic helicopter service in Norfolk, has been referred to this department.

In reference to the intended amendment to your ordinance relating to aircraft operations, I wish to advise that the City of Chicago has not adopted anything similar thereto. Consequently, air traffic operations over the City are subject only to Part 60.17 of the Civil Air Regulations which correspond basically to what your proposed amendment provides.

I would like to point out that the City of Chicago has long had ordinances in effect which forbid the operation of aircraft over the City while towing any advertising display or other object (Ch. 36-28.1); the dropping from any aircraft, while operating over the City, any object, including circulars, posters, hand-bills or other advertising matter (Ch. 36-28.2) and the use of any sound amplifier or similar mechanical device from an aircraft for the purpose of advertising goods, wares or merchandise (Ch. 36-28.3).

The helicopter operation in the City of Chicago is a joint venture between Radio Station W. G. N. and the City, acting through the Department of Police. The helicopter is leased by the radio station and the City bears no

share of that expense. The radio station installs and maintains, at its own expense, its broadcasting equipment and the City installs and maintains, at its own expense, the police broadcasting equipment. Thus, the police officer-announcer not only is in a position to report traffic conditions during the rush hours but is also in a position, through the use of the police facilities, to immediately inform the police communication center of any observed activities or occurrences which would merit the immediate dispatch of police, fire, or other City equipment as may be necessary to cope with the matter.

The police officer-announcer is a member of the Chicago Police Department and receives the same salary as any other police officer. The radio station provides, at its own expense, an accident policy for the police officer-announcer in the amount of \$100,000.00. Additionally, the owner of the helicopter leased to the radio station carries insurance with Lloyds of \$5,000,000 public liability, bodily injury and property damage plus \$100,000 per passenger seat.

The City of Chicago also recently adopted an ordinance intended to regulate the establishment of heliports within the City, a copy of which is forwarded herewith for your examination. The Chicago Zoning Ordinance therein referred to forbids the establishment of a heliport in a residential area and makes the establishment of a heliport a special use in any other area. In all instances a special use cannot issue without a public hearing.

We sincerely hope that the foregoing may be of assistance to you.

AIRPORT ANNEXATION

(City Attorney, City of LaSalle, Illinois—J. E. S.—December 18, 1962)

Your recent letter addressed to Honorable John C. Melaniphy has been forwarded to this Division for answer.

You request that we advise the legal basis for the annexation of Chicago-O'Hare International Airport by the City of Chicago. The City of Chicago did originally bring the airport within the corporate limits of the city by the annexation of certain highways which traversed unincorporated territory between the airport and the corporate limits of the City. Numerous cases from other jurisdictions have upheld the achievement of contiguity through the use of connecting highways or strips of land. Of immediate interest to your problem would be *Village of Saranac Lake v. Gillespie, et al.*, 24 N. Y. S. 2d 403. Other cases are:

Todd v. City of Houston, 276 S. W. 421;

People ex rel. Peck v. City of Los Angeles, 97 P. 310;

Sharp et al. v. Oklahoma City, 74 P. 2d 383;

Lefter et al. v. City of Dallas, 177 S. W. 2d 222;

Bowen et al. v. City of Wichita Falls, 182 S. W. 2d 695;

People ex rel. Forde v. Town of Corte Madera, 251 P. 2d 988.

Of additional interest would be the annual editions of NIMLO, Municipal Law Review, wherein are generally discussed like annexations. The question is likewise annotated in 62 A. L. R. 1011; 13 A. L. R. 2d 1279 and 18 A. L. R. 2d 1255. A review of the plats of various cities throughout the United States will disclose additional like annexations which have not been subjected to court action. A ready reference source in the immediate vicinity is the Reference Library of Rand, McNally & Company, located at 8255 N. Central

Park Avenue, Skokie, Illinois. Cases in Illinois, partially discussing the question are:

Wild v. People ex rel. Stephens, 227 Ill. 556;

City of Belleville v. St. Clair County Turnpike Co., 234 Ill. 428;

Village of Morgan Park v. City of Chicago, 255 Ill. 190;

and recently

People ex rel. Adamowski v. The Village of Streamwood, 15 Ill. 2d 595;

all of which cases were in our mind largely decided upon the question of necessity and reasonableness.

It is not apparent that the Supreme Court in the State of Illinois has ever had the opportunity to rule upon an annexation involving a highway or strip of land which was used to connect a city with a city-owned and operated public facility which, for the purposes of municipal control and administration, is of vital import to the citizens of the community who not only own and operate the facility, but have generally invested considerable sums of money therein.

It is one thing to attempt annexation of a maze of streets and highways to control private development, as is pointed out on page 601 of the Streamwood case, *supra* but it is yet another thing, in our opinion, to annex a particular highway or strip of publicly owned land to protect a public investment. *Village of Saranac Lake v. Gillespie*, *supra*.

We sincerely hope that the foregoing may be of some assistance to you in arriving at a solution of your immediate problem.

It may also be proffered that as was latterly done in the case of O'Hare Field through statutory amendment, Chapter 24, Section 7-1-25, Ill. Rev. Stat. 1961 and subsequent implementation thereof, that consideration could be given to amendment of Section 7-1-9 of said chapter to specifically provide for the type of annexation which you have in mind.

Discussing further, after the annexation of the airport via Higgins Road, Section 7-1-25 herein cited was approved during the 1959 Session of the Legislature and pursuant to said section in later negotiations with the Village of Rosemont a strip of land approximating 150 feet in width and including the North half (N½) of West Foster Avenue, extending from the then City Limits of Chicago, being the center line of the Des Plaines River to the Eastern boundary of the airport and adjacent to the Village of Schiller Park, was disconnected by said Village of Rosemont and annexed to the City of Chicago. The City of Chicago thereafter disconnected Higgins Road between the City Limits and said airport.

If we may be of any further assistance in this matter do not hesitate to so advise.

PARKING CONTROL OF PRIVATE AIRPLANES

(Commissioner of Aviation—R. L. H.—March 19, 1963)

Your letter of February 13, 1963, in the above matter has been received and we find therein a number of questions requiring answer.

The major question is whether any airline has the authority to park aircraft owned by private parties in or on the facilities it occupies at the airport. The Airport Use Agreement and the Hanger and Hanger Site Lease indicate quite clearly that the leased facilities at the airport are to be used by the airline parties only for their own aircraft as required in the prosecu-

tion of an air transportation business. There is no provision granting any airline the privilege of parking privately owned aircraft either in their hangers or on the areas adjacent thereto. A Public Aircraft Parking Area has been provided for the parking of privately owned aircraft.

We therefore suggest that a letter be drafted and sent to Eastern Airlines, Inc., and the other airline parties advising them that under no circumstances are their leased facilities at the airport to be made available to any private parties for the parking of aircraft unless explicit authority therefor is obtained.

We now come to the other question raised by your letter of inquiry. This relates to the propriety of the parking fee charge to Arthur Godfrey. From a strictly technical point of view, since the aircraft was not parked in the public parking area, it is questionable whether there can be a valid claim for the parking fee against Arthur Godfrey.

Section 37-12.3 of the Municipal Code of Chicago provides in part :

" . . . no person, firm or corporation owning, operating, or in control of any aircraft shall park or store such aircraft in any area of an airport other than a public aircraft parking area . . . "

and Section 37-15 provides for a penalty of from \$5.00 to \$200.00 for each violation of the provisions of Chapter 37. Each day of violation shall be considered a separate offense. In this vein, then, we are of the opinion that Arthur Godfrey Enterprises, Arthur Godfrey, and the pilot of the aircraft could be held accountable on the violation of this ordinance by the parking of the aircraft "in an area other than the public aircraft parking area", to wit : the Eastern Airlines hanger. Since the plane was so hangered for a period of ten days, there is a possibility of a maximum fine of \$2,000.00. It is also our opinion that this violation could also attach to Eastern Airlines, Inc. since during the time the aircraft was hangered in their premises, Eastern was "in control" of the aircraft, and aided and abetted the violation of the ordinance by allowing the parking in its hanger.

We believe, that all of the airline parties be apprised of these sections of the Municipal Code, such that in the future problems of unauthorized parking can be avoided.

In the event we can be of further service in this matter, please feel free to call upon us.

FLIGHT TRAINING SCHOOL

(Commissioner of Aviation—R. L. H.—May 6, 1963)

We are in receipt of your letter of April 5, 1963, wherein you request a further opinion in the above matter raising questions not covered either in your prior request or our reply thereto dated March 20, 1963.

Your understanding of our opinion of March 20, 1963, as to what constitutes legally unobjectionable methods of conducting a flight training business is correct.

Regarding the possibility of a training business being operated in an Airline Party's hanger by virtue of a sublease from said Party and a concession agreement with the City, it is our opinion that this proposal, although presently strictly in the realm of conjecture, would not be proper.

The Airline Parties have executed leases of facilities for use in the Air Transportation business. Hanger facilities, as well as other leased facilities, by the terms of the individual leases may be used by the said Parties to train

their own personnel, but, as set forth in the prior opinion hereinabove referred to, it is nowise intended to establish a general training school on said leased premises.

Each of the facilities leased to the Airline Parties at the Airport has a certain basic use. In the case of the Hanger and Hanger Site Lease, the basic use is one of the hangering of aircraft, with additional uses being those directly related thereto. The operation of a flight training school does not appear to fit within the confines of the related uses of hanger facilities and would therefore be an improper use of such facilities no matter who intends to operate the flight training school.

We are definitely of the opinion that the methods outlined in our opinion of March 20, 1963, as restated by you in the instant letter of request, are the only legally unobjectionable methods of conducting a flight training business at the airport.

If we can be of further service to you in this matter, please feel free to call upon us at your convenience.

LEASE OF OFFICE SPACE

(Commissioner of Aviation—C. F.—January 27, 1964)

We acknowledge receipt of your letter of January 22, 1964, in which you request our opinion as to whether an application may be approved to a yacht brokerage office for office space in the Terminal Building in Meigs Field.

The habendum clause of the lease agreement between the Chicago Park District and the City of Chicago specifically states:

"To have and to hold the said demised premises for a term of * * * upon the limitation herein contained and for the uses and purposes of constructing, operating and maintaining a public airport and the structures, facilities, appurtenances and utilities thereunto appertaining as hereinafter limited, and for no other purpose whatsoever."

Other specific restrictions appear also in the enumeration of the Lessee's covenants as follows:

Section 2 states: "The Lessee shall have the right at its sole cost and expense during the term of this lease to construct, reconstruct, operate and maintain a public airport and to erect an administration building, a control tower building and buildings, structures and facilities for emergency repairs and service to aircraft, and none others * * *"

Section 15 declares:

"The Lessee shall not contract with any person for the management or operation of the airport but shall manage and operate the same as a municipal enterprise and shall not assign this lease or any interest therein or sublet any portion of the premises herein demised, but may grant permission and authority to any person to occupy and use space within the demised premises for any service necessary and incidental to the operation of a public airport * * *"

It is readily apparent from the foregoing that the Chicago Park District, as Lessor, has limited and restricted the use of the demised premises and appurtenances thereon solely to airport purposes (See *Lyon v. Bethlehem Engineering Corporation*, 253 N. Y. 111).

It is, therefore, the opinion of this office that an application for office space in the Terminal Building at Meigs Field for use as a Yacht Brokerage office is inconsistent with and contravenes the terms of the lease agreement between the Chicago Park District and the City of Chicago for the operation of Meigs Field and should be denied.

RIGHT OF USE OF MEIGS FIELD

(G. P. G.—R. L. H.—February 14, 1964)

In connection with the above project application and pursuant to your request, we submit the following opinion as to the right and interest of the City to use and occupy as a municipal airport a portion of the property located on Northerly Island and the submerged lands lying adjacent thereto and located in Sections 22 and 23, Township 39 North, Range 14 East of the Third Principal Meridian in Cook County, Illinois, otherwise known as Merrill C. Meigs Field.

The right and interest of the City of Chicago to use and occupy said premises is based on a lease and amendments thereof from the Chicago Park District, a municipal corporation. Execution of said lease and amendments thereto was authorized by ordinance of October 8, 1946 (C. J. pp. 6438-6440), as amended by ordinance of December 17, 1948 (C. J. page 6711), as further amended by ordinance of April 4, 1949 (C. J. page 3946), and as further amended by ordinance of September 14, 1955 (C. J. pp. 971-2), copies of said ordinances having been sent to you on August 13, 1958, and as further amended on August 22, 1963 (C. J. pp. 801-2), a copy of said ordinance being attached hereto.

Title to Northerly Island and the submerged lands lying adjacent thereto leased by the Park District to the City is vested in the Chicago Park District pursuant to an Act entitled "An Act to enable park commissioners having control of a park or parks bordering upon public waters in this state to enlarge and connect the same from time to time by extensions over lands and the bed of such waters, and defining the use which may be made of such extensions and granting lands for the purpose of such enlargements", approved May 14, 1903 (1903 Ill. Rev. Stats., ch. 105, par. 92, et seq.). Section 1 of said Act provides:

"That every board of park commissioners existing under the laws of this state, which has now, or may hereafter have or acquire control over any public park, boulevard or driveway bordering upon any public waters in this state shall have the power to extend such park, . . . by constructing a park . . . extending over and upon the submerged land and bed of such public waters, and over and upon any lands adjacent to or adjoining upon or penetrating into such waters . . ."

Section 4 of said Act provides:

"The title to any such extension or connection of such park or parks, boulevards, driveways and parkways, and to the bed thereof shall be, and hereby becomes vested in such board of park commissioners for public purposes, and the same shall thereby become a part of the public park or parks under the control of such board, and shall thenceforth be maintained and controlled by such board in the manner provided by law, for the government and maintenance of other parks, boulevards and driveways under its control, and all cases where any boulevards, driveway or parkway is extended or constructed under the provisions of this act, the title to the submerged lands lying between the shore of such public waters and the inner line of the extension of such boulevard, driveway or parkway, shall be, and thereby becomes

vested in such board of park commissioners for public purposes; and in case any such park, boulevard, driveway or parkway extension or connection as provided in this act shall be made into, over or upon the bed of Lake Michigan by any such board of park commissioners, then the right, title and interest of the State of Illinois in and to the bed of so much of said Lake Michigan shall be vested in such board of park commissioners as in other cases provided in this act, and for the same purposes and within the same rights and power."

The South Park Commissioners was a board of park commissioners existing under the laws of the State of Illinois having control of a public park bordering upon the public waters of the state, and thus, under the provisions of said Act, had the right to extend the park by filling in the submerged lands of Lake Michigan, and upon so doing, the title thereto vested in the South Park Commissioners.

Under the provisions of the Act in relation to the creation, maintenance, operation and improvement of the Chicago Park District approved July 10, 1933 (1963 Ill. Rev. Stats., ch. 105, para. 333.1), the Chicago Park District was created in succession to the South Park Commissioners and became vested with all the rights and powers of the South Park Commissioners.

In 1935 the legislature passed an Act entitled "An Act to enable park commissioners, park boards or boards of park commissioners to grant, convey or lease lands and rights to cities and villages for airport uses and purposes", approved July 11, 1935 (1963 Ill. Rev. Stats., ch. 105, para. 327c1).

Said Act provides:

"That any park commissioners, park board or board of park commissioners which has heretofore acquired or shall hereafter acquire the title to any lands adjacent to or adjoining upon or penetrating into any public waters in this State or to the submerged lands and bed of such public waters, or any part thereof, or to any riparian or other rights, may grant, convey or lease any of such lands or rights to any city or village authorized to establish, maintain and regulate airports in, over and upon the public waters bordering thereon. Any such park commissioners, park board or board of park commissioners may grant, convey or lease to any such city or village the right to construct and maintain causeways, roadways and bridges and any other appropriate approaches to or connections with any airport, landing field, airdrome or landing float of such city or village over and across any lands and property of such park commissioners, park board or board of park commissioners."

The Act above cited granted to the Chicago Park District the right to lease Northerly Island and the submerged lands adjacent thereto to the City of Chicago for airport purposes.

It should be noted that under Section 4 of the 1903 Act by which the submerged lands of the state were conveyed to the park district, title to such lands vested in the park commissioners for "public purposes". The operation of a public airport and maintenance thereof by a municipality has been held by the Illinois Supreme Court to be a public purpose, so that there is no inconsistency between the Act of 1903 vesting title in the park district and the Act of 1935 authorizing the park district to lease said lands to the City of Chicago for the establishment, maintenance and regulation of airports.

AIRPORT PLAN DEVELOPMENT

(General Services Administration—J. C. M.—March 11, 1964)

In reply to your letter of February 19, 1964, "Airport Plan Development" is provided for by the designation of "Airport Plan Development" on the District Map showing where the three Airports of Chicago are located. A "Planned Development," defined in Chapter 194 A, Municipal Code of Chicago, benig the Chicago Zoning Ordinance, is as follows:

"Planned Development. A 'Planned Development' is a tract of land which is developed as a unit under single ownership or control, or which is under single designated control by a common ownership at the time it is certified as a 'Planned Development' and which includes two or more principal buildings, except in the case of hospital planned developments or air rights planned developments which may have only one principal building. A 'Planned Development' shall be at least four acres in area, except for planned developments operated by a municipal corporation, or a hospital as defined by law, which shall be at least two acres in area, manufacturing planned developments which shall be at least 10 acres in area, and air rights planned developments which shall not require any minimum area."

All matters pertaining to any improvements to Chicago's Airports, whether Federal funds are available or not for a particular project, are presented to the City Council and proper ordinances authorizing the project are enacted. All projects at an airport, prior to construction, are approved by the FAA or CAA, depending upon the jurisdiction.

In reference to Building No. 6, which is the large one-story building, formerly the Assembly Plant of the Douglas Aircraft Company, included in the surplus property conveyance, will be demolished during the year 1965. The roof of the building is in a bad shape of repair and may collapse at any time. It would cost a considerable sum of money to try to repair that roof. It is the City's position that it is more to the advantage of the City to have the land available for new improvement, such as for cargo buildings, rather than put forth any further expenditures on Building No. 6. We would have to wait until the year 1965 to demolish this building because we must have an appropriation to provide for the cost thereof and our next appropriation ordinance will be for the year 1965. It will cost a considerable sum of money to demolish this building.

INTERNATIONAL AIRPORT RESTAURANTS

(Acting City Comptroller—C. F.—April 23, 1964)

Your letter of March 10, 1964, requests an opinion on whether the O'Hare Airport Revenue Fund or International Airports Restaurant, Carson, Pirie, Scott & Company, is responsible for financing the maintenance of four elevators located in the main restaurant building in Chicago-O'Hare International Airport.

Examination of the lease and agreement fails to disclose any provision that places on Carson, Pirie, Scott & Company the responsibility for maintaining the elevators.

An examination of Exhibits A-1 to A-4, inclusive, which are attached to and made a part of the lease and agreement adopted by the City Council of the City of Chicago on July 28, 1961, shows that the elevators in question are located outside the demised premises being used by the Lessee for the main restaurant in Building No. 6 but are within the area of jurisdiction retained by the City in the aforesaid building.

Therefore, it is our opinion that the City must bear the responsibility of defraying costs to maintain the elevators in question.

Your letter indicates that Carson, Pirie, Scott & Company has been assuming control in hiring proper help to perform maintenance work on the elevators and then sending invoices to the City each month for this expense.

We suggest that the foregoing procedure is improper and that the proper City authorities should assume the responsibility for the performance and cost of maintenance work on the elevators in question.

If we may be of further assistance, please do not hesitate to advise.

AIRPORT USE AGREEMENT

(Commissioner of Aviation—J. E. S.—March 31, 1965)

With your letter of recent date was transmitted a copy of a letter dated February 3, 1965 from Continental Airlines which purports to answer a request of this department regarding the intended use by said Airline of space in the International Building at O'Hare Field. Said letter states that the reason for the request of this space is to accommodate Continental's operation personnel who handle the servicing of five International Carriers that arrive and depart from O'Hare. Other correspondence transmitted with your letter indicates that the servicing discussed consists of both turn-around service and inplane fueling which terms encompass, as it is understood in this department, the furnishing of ramp equipment, fuel storage, fuel trucks, baggage handling services, aircraft inspection, aircraft cleaning, linens and lavatory service, amongst others, along with necessary manpower therefor.

Your letter further requests the opinion of this department in respect to the following questions:

(a) Does Continental's present operation constitute "any business separate from its operation of an air transportation system"? (Article I, Airport Use Agreement);

(b) In permitting Continental's present operation may the City be construed as granting Continental rights or privileges more favorable than those granted other signatory airlines? (Section 17.01, Airport Use Agreement.);

(c) Does Continental's present operation violate Butler's contract in any respect?

The above referred to Article I grants to an airline the right and privilege to operate at the airport an air transportation system, which right includes generally the servicing of aircraft and other equipment operated by airline or by any other scheduled air transportation company with fuel, foods and beverages and other supplies and materials and to perform those other activities which are commonly considered routine ramp servicing. Said rights are granted subject to the proviso that such grant shall not be construed to authorize the conduct by airline of any business separate from its operation

of an air transportation system and provided further that the rights relating to fuel may be exercised by airline only with respect to aircraft and other equipment operated by airline parties.

Airline parties, as defined in Section 15.10 of the Use Agreement is limited to mean in essence those air carriers who then have agreements with City substantially the same as this agreement.

It is respectfully pointed out that the only International Air Carrier presently falling within the definition of airline parties is Pan American World Airways, Inc. Thus, all other International Air Carriers would be without the definition and the servicing of said carriers with fuel by Continental would be subject to the aforementioned proviso and thus beyond the scope of the rights granted in Article I.

Further, the performance of other ramp servicing for said carriers is, in our opinion, when operated on a regular, contractual, multicarrier basis, beyond the scope of the right granted to Continental to operate an air transportation system and thus would likewise be within the above-mentioned proviso.

It is suggested, therefore, that Continental Airlines be advised that the separate business relating to ramp service and inplane refueling is without the right and privilege accorded under the Airport Use Agreement and consequently same should be immediately terminated.

In light of the foregoing, answers to questions (b) and (c), as posed in your letter, are not at this time deemed necessary.

AIRPORT ADVERTISING

(Commissioner of Aviation—R. L. H.—April 30, 1965)

Your recent letter with letter attached from Modern Talking Picture Service, Inc. requests our opinion as to whether their proposal to show public relations movies sponsored by various companies free of charge at the Airport can be considered directly with them, or whether you must work with or through Dell Airport Advertising, Inc., pursuant to their concession agreement authorized on pages 5707 to 5711 of the November 1, 1961 Council Journal.

Although the films proposed will purportedly not attempt to directly sell any product or service, the fact that they appear to be promotional films sponsored by various companies indicates that they probably use the "soft-sell" approach, that is, entertain and leave a lingering message with the viewer which hopefully will be remembered when in the market for the type of product or service mentioned in the film.

We sincerely doubt that this type of proposal was contemplated in the Dell concession agreement, but since this proposal is for "advertising" materials, they do appear to be included within the broad terms of the exclusive right given to Dell in the aforesaid agreement.

It is our opinion, therefore, that unless you can obtain a waiver of right from Dell allowing you to work directly with Modern, the broadness of the Dell agreement will force you to deal with or through them.

If we can be of any further service to you in this matter, please feel free to call upon us at your convenience.

DISTRIBUTION OF HANDBILLS AT O'HARE

(Commissioner of Aviation—M. E. A. and S. R. D.—August 30, 1965)

Reference is made to your letter of June 11, 1965, in which you request our opinion as to whether the Manager of the O'Hare-International Airport may refuse union officials permission to distribute handbills within the Airport Terminal.

In our opinion, under certain circumstances, he may do so. Normally, distribution of such literature is permitted on the public streets and ways, pursuant to the provisions of the United States Constitution. However, a public building is not necessarily to be treated in the same manner as public streets and ways as far as freedom to distribute literature is concerned. Where it is necessary to assure the orderly administration and function of business, the distribution of literature in public buildings may be proscribed.

Therefore, if in the discretion of the Airport Manager the orderly administration of the public business requires restriction of distribution of literature within the Terminal Building, he may order such restriction.

O'HARE AVIATION EASEMENT

(Committee on Finance—J. D. M.—November 14, 1966)

In accordance with the ordinances passed by the City Council on February 6, 1948 (C. J. pp. 1888-92) and as amended on March 2, 1951 (C. J. pp. 7883-91) and as amended on July 11, 1956 (C. J. pp. 5777-5784) and as amended on July 21, 1961 (C. J. pp. 5253-5257), providing for the acquisition of lands needed for the expansion, extension and improvement of O'Hare International Airport, negotiations were carried on with the owners of the following described property for the acquisition of aviation easements over said property as set forth as follows:

AVIGATION EASEMENTS

The air space over and across those parts of the Grantor's said land, legally described as follows:

All of lots 19, 20 and 21 in block 1, all of blocks 2 and 7, and all of lots 16 to 24, both inclusive, in block 8 in Fairview, Eberhard and Royce's subdivision of the West $\frac{1}{2}$ of the southeast $\frac{1}{4}$ of Section 9, Township 40 North, Range 12 east of the Third Principal Meridian, and the north $\frac{1}{2}$ of the northeast $\frac{1}{4}$ of the southwest $\frac{1}{4}$ of Section 9 and the north $\frac{1}{2}$ of the northwest $\frac{1}{4}$ of the northeast $\frac{1}{4}$ of Section 16, Township 40 North, Range 12 east of the Third Principal Meridian, except a strip of land $16\frac{1}{2}$ feet wide off the west end of the north $\frac{1}{2}$ of northwest $\frac{1}{4}$ of the northeast $\frac{1}{4}$ of said Section 16, together with that part of the north $\frac{1}{2}$ of Florence Avenue lying between Fifth Avenue and the east line of lot 24 in block 8 aforementioned extended South, that part of vacated Aberdeen Street lying between Fifth Avenue and the east line of lot 21 in block 1 aforementioned extended south and the east line of lot 16 in block 8 aforementioned extended north, that part of vacated Seventh Avenue lying between vacated Florence Avenue and the center line of the east and west alley in block 1 aforementioned extended west and the

west $\frac{1}{2}$ of said vacated Seventh Avenue lying between Foster Avenue and the center line of the east and west alley in said block 1 extended west, that part of Fifth Avenue lying between the center line of vacated Florence Avenue and the center line of Foster Avenue, that part of Foster Avenue lying between Fifth Avenue and the center line of vacated Seventh Avenue.

The vacated east and west alleys in blocks 2 and 7 aforementioned, that part of the south $\frac{1}{2}$ of the east and west alley north of and adjoining lots 19, 20 and 21 in block 1 aforementioned and that part of east and west alley adjoining lots 16 to 23, both inclusive, and the south $\frac{1}{2}$ of said alley lying north of and adjoining lot 24 in block 8 aforementioned, provided, however, that the airspace which is hereby granted shall be only that which lies above the following heights:

An inclined plane which passes through a line described as follows: Beginning at an elevation of 688 M S L above a point on the south line of lot 26 in block 7 aforementioned, said point being 10 feet east of the southwest corner of said lot 26; thence upward and northerly along a line having a slope ratio of 1 foot vertical measurement to every 50 feet of horizontal measurement (said line forms a horizontal angle of $40^{\circ}-15'$ with the east line of the west 10 feet of said lot 26), to its intersection with a vertical plane passing through the center line of Foster Avenue.

Also, downward along said line extended northwesterly having the same slope ratio to its intersection with a vertical plane passing through the center line of vacated Florence Avenue, except that part of Grantor's said land, which lies southeasterly of the following described line: Beginning at the southwest corner of lot 37 in block 7 aforementioned; thence northeasterly to a point on the east line of lot 21 in block 1 aforementioned, said point being 45 feet north of the southeast corner of said lot 21.

All of the air space which lies above a horizontal plane which has an elevation of 704 M S L.

Also, the air space lying above an inclined plane beginning at an elevation of 688 M S L along the center line of vacated Florence Avenue: thence north on said plane having a slope ratio of one (1) foot vertical measurement to seven (7) feet of horizontal measurement to its intersection with said horizontal plane at an elevation of 704 M S L.

Also, the air space above an inclined plane passing through an elevation of 692 M S L above the southwest corner of lot 37 in block 7 aforementioned and an elevation of 704 M S L above a point on the east line of lot 21 in block 1 aforementioned, said point being 45 feet north of the southeast corner of said lot 21; thence southeasterly (so that a line on said plane would form a horizontal angle of $40^{\circ}-15'$ with the north line of vacated Florence Avenue) on said plane having a slope ratio of one (1) foot vertical measurement to seven (7) feet of horizontal measurement to its intersection with said horizontal plane which is at an elevation of 704 M S L, over that part of Grantor's said property, which lies southeasterly of the following described line: Beginning at the southwest corner of lot 37 in block 7 aforementioned; thence northeasterly to a point on the east line of lot 21 in block 1 aforementioned, said point being 45 feet north of the southeast corner of said lot 21, and lying north of the center line of vacated Florence Avenue.

ALSO

The air space over and across those parts of the Grantor's said land, legally described as follows:

That part of block 4 together with vacated streets and alleys described as follows: Beginning at the intersection of the north line of block 4 extended west to the center line of Pearl Street; thence south along the center line of Pearl Avenue 550 feet to the intersection with

the south line of lot 22 extended west in block 4 aforesaid; thence east along the last described line to the intersection with the Westerly Right of Way Line of the Northern Illinois Toll Road; thence northeasterly along the Westerly Right of Way Line of the Northern Illinois Toll Road to the intersection with the south line of lot 45 in block 4 aforesaid; thence west along the south line of said lot 45 extended west to the center line of a 16 foot vacated alley; thence north along the center line of the aforesaid 16 foot vacated alley 50 feet; thence east along the north line of lot 46 extended west in block 4 aforesaid to the intersection with the Westerly Right of Way Line of the Northern Illinois Toll Road; thence northeasterly along the Westerly Right of Way Line of the Northern Illinois Toll Road to the intersection with the north line of block 4 aforesaid; thence west along the north line of block 4 aforesaid extended west to the center line of Pearl Street being the point of beginning, all in Fairview Heights being a subdivision in the east fractional $\frac{1}{2}$ of the southeast $\frac{1}{4}$ of Section 9, Township 40 North, Range 12 East of the Third Principal Meridian; also, that part of Blocks 1 and 8 together with vacated streets and alleys described as follows: Beginning at the intersection of the north line of block 1 extended east to the center line of Pearl Street; thence south along the center line of Pearl Street to the center line of Florence Avenue; thence west along the center line of Florence Avenue to the intersection with the Easterly Right of Way Line of the Minneapolis, St. Paul and Sault Ste. Marie Railroad; thence northeasterly along the Easterly Right of Way Line of the aforesaid Railroad to the intersection with the north line of block 1 aforesaid; thence east along the north line of block 1 aforesaid extended east to the center line of Pearl Street being the point of beginning (excepting from the aforesaid tract, Lot 26 in Block 1 and Lot 10 in Block 8, together with the half of the vacated streets and alleys adjoining said Lots) all in Fairview, Eberhart and Royce's Subdivision, being a subdivision of the west $\frac{1}{2}$ of the southeast $\frac{1}{4}$ of Section 9, and the north $\frac{1}{2}$ of the northeast $\frac{1}{4}$ of the southwest $\frac{1}{4}$ of Section 9, and the north $\frac{1}{2}$ of the northwest $\frac{1}{4}$ of the northeast $\frac{1}{4}$ of Section 16, all in Township 40 North, Range 12 East of the Third Principal Meridian, except a strip of land $16\frac{1}{2}$ feet wide off of the west end of the north $\frac{1}{2}$ of the northwest $\frac{1}{4}$ of the northeast $\frac{1}{4}$ of Section 16, provided, however, that the air space which is hereby granted shall be only that which lies above the following height:

A horizontal plane which is at an elevation of 704 M S L over Grantor's last described property.

ALSO

The air space over and across those parts of the Grantor's said land, legally described as follows:

That part of blocks 18 and 19, together with vacated streets and alleys in Fairview, Eberhart and Royce's Subdivision, being a subdivision of the west $\frac{1}{2}$ of the southeast $\frac{1}{4}$ of Section 9, and the north $\frac{1}{2}$ of the northeast $\frac{1}{4}$ of the southwest $\frac{1}{4}$ of Section 9, and the north $\frac{1}{2}$ of the northwest $\frac{1}{4}$ of the northeast $\frac{1}{4}$ of Section 16, all in Township 40 North, Range 12 East of the Third Principal Meridian, except a strip of land $16\frac{1}{2}$ feet wide, off of the west end of the North $\frac{1}{2}$ of the northwest $\frac{1}{4}$ of the northeast $\frac{1}{4}$ of Section 16 bounded by a line described as follows: Beginning at the southwest corner of Lot 25 in Block 19; thence north along the west line of said Blocks to a point in the west line of said block 18 which is 120.85 feet north of the southwest corner of lot 25 in block 18 aforesaid; thence southeasterly along a line which forms an angle of $81^{\circ} 45' 49''$ from south to east with the west line of blocks 18 and 19 aforesaid a distance of 585.75 feet to a point of intersection with the Westerly Line of the Northern Illinois Toll Highway; thence continuing southwesterly along the Westerly Line of the Northern Illinois Toll Highway a distance of 20.83 feet to a point on the south line of lot 25 in block 18 aforesaid which is 573.08 feet east of the southwest

corner of lot 25 in block 18 aforesaid; thence south 8.0 feet; thence west 5.67 feet; thence south 8.0 feet to the northeast corner of lot 2 in block 18 aforesaid; thence southwesterly 136.41 feet to a point on the south line of lot 3 in block 18 aforesaid which is 2.67 feet east of the southwest corner of said lot 3; thence south 33.01 feet; thence west 32.53 feet; thence south 33.01 feet to a point on the north line of lot 5 in block 19 aforesaid which is 18.14 feet east of the northwest corner of lot 5 aforesaid; thence southwesterly 143.51 feet to a point on the south line of lot 7 in block 19 which is 3.58 feet east of the southwest corner of lot 7 aforesaid; thence south 8.0 feet; thence west 7.83 feet; thence south 8.0 feet to a point on the north line of lot 41 in block 19 aforesaid which is 19.75 feet east of the northwest corner of lot 41 aforesaid; thence southwesterly 143.48 feet to a point on the south line of lot 39 in block 19 which is 17.78 feet west of the southeast corner of lot 39 aforesaid; thence west along the south line of block 19 aforesaid a distance of 357.22 feet to the point of beginning (except lot 25 in said block 18 aforesaid), provided, however, that the air space which is hereby granted shall be only that which lies above the following height:

A horizontal plane which is at an elevation of 704 M S L over Grantor's last described property.

ALSO

A continuing right to keep the air space above the aforesaid heights clear and free from any and all trees, poles, buildings and other obstructions of any kind or nature whatsoever, which now extend, or which may at any time in the future extend above the aforesaid heights, together with the right of ingress to, egress from, and passage over the land of the Grantors for the purpose of effecting and maintaining such clearance or removing any and all obstructions which now or may hereafter extend above the said heights.

Grantors shall not hereafter use or permit the use of said land in such a manner as to create electrical or electronic interference with radio communication or radar operations between the installation upon O'Hare Field, Chicago-O'Hare International Airport, and aircraft using the airport, or so as to impair the vision of pilots using the airport, or so as otherwise to endanger the landing, taking-off or maneuvering of aircraft as determined solely by the Federal Aviation Agency, or its duly authorized representatives, or their successor. The aforesaid covenants and agreements shall run with the land of the Grantors for the benefit of the Grantee, its successors and assigns, in the ownership and operation of Chicago-O'Hare International Airport.

The property consists of approximately 20 acres of land zoned Industrial and includes adjoining streets and alleys. It is located on the East end of the airport from Fifth Avenue to the Right of Way of the Illinois Tollroad in Schiller Park.

The owners have agreed to accept the sum of Thirty-Five Thousand and No/100 (\$35,000.00) Dollars and the said commitment is attached hereto.

We recommend that the purchase of this property, in accordance with the foregoing, be authorized and transmit herewith a proposed Council Order.

FUELING AT MEIGS

(Commissioner of Aviation—J. E. S.—November 30, 1966)

Your recent letter requested the opinion of this department on the following questions:

1. May the City grant the right to Commuter Airlines to fuel their own planes at Merrill C. Meigs Field?
2. Is the City required to grant Commuter Airlines the right to fuel their own planes?
3. If such a right is granted, can the City require Commuter Airlines to pay to City a gallonage charge therefor?

Answering question 1 above, it is the opinion of this department that under the Federal Aviation Agency Statement of Policy 30 F. R. 13,661, the City of Chicago may grant to Commuter Airlines the privilege to fuel their own planes at the above cited airport. It is not apparent that any contractual or legal impediment standing alone would preclude such grant.

As stated in paragraph 7 (d) of said Policy Statement, an owner of an aircraft should be permitted to fuel, wash, repair, paint and otherwise take care of his own aircraft. A restriction per se which has the effect of diverting such business to an operator of such an aeronautical activity amounts to an exclusive right contrary to law.

Answering question 2, if safety, preservation of facilities and protection of the public interest reasonably necessitate restrictions on self-service activities, the City would not be required to grant Commuter Airlines the right to fuel their own airplanes. However, such restrictions, if reasonably necessary, should be adopted by ordinance of general application. It does not necessarily follow that a right to utilize an airport with an aircraft is accompanied by a right to bring fuel trucks over the boulevards of Chicago and on to the airport proper and to use the airport service without any consideration therefor.

Answering question 3, it would be the opinion of this department that there would be nothing improper if the City by amendment to the existing contract intended to provide for parking space for such ground equipment as would be necessary to fuel Commuter Airlines, did require a gallonage charge or a flat rental as consideration therefor.

If it is desired to discuss this matter further, please so advise.

Section B. CONSTRUCTION

DEDUCTIONS FOR VARIATIONS

(Commissioner of Public Works—E. B.—May 2, 1963)

Pursuant to your request dated April 26, 1963 to review your proposed reply to the letter dated April 19, 1963 from the Attorney for the contractor, Arcole Midwest Corporation, with reference to your right to make the deduction in the cost of pavement due to variations in the surface, the deduction is calculated to be \$5,565.10, and to advise you as to your legal right in assessing such a penalty in accordance with Article 48.25 of the Illinois Division of Highways, Standard Specifications for Road and Bridge Construction, we beg to reply as follows:

Article 48.25 of said Standard Specifications provides the following:

“Surface Test. The finished surface of the pavement shall be with-

in the tolerance of the following surface trueness test.

- (a) The pavement shall be tested for trueness at the expiration of the required curing or protection period. The surface shall be tested by means of a 10-foot straightedge placed parallel to the center line of the pavement, parallel to the grade line in each wheel lane, and touching the surface. Ordinates measured from the face of the straightedge to the surface of the pavement shall at no place exceed $\frac{1}{8}$ inch.
- (b) In each wheel lane, for every variation from the true surface greater than $\frac{1}{8}$ inch and less than $\frac{1}{2}$ inch, there shall be deducted from the amounts due the Contractor the cost of one square yard of pavement at the contract unit price per square yard.”

You state in your proposed reply that you made tests pursuant to said provision with an instrument consisting of “a 10-foot straightedge on wheels, that accurately measures all surface deviations”; and that the testing was visually seen by personnel of the Contractor; that these tests were made as soon as the roadway was in condition to do so, namely, after it was cleared of debris and other foreign material which the Contractor was required to remove under the contract and which he was urged to remove, and that the deviations greater than $\frac{1}{8}$ inch were marked on the pavement; that whatever trucks and other equipment were used in the expressway were those of the Contractor; that at the time of the testing the pavement surface was specifically cleaned for that purpose; that up to that time it was not in satisfactory condition for testing after the curing period.

We are of the opinion, that from the facts as stated, and in compliance with the above provisions of the specifications, that you are not only perfectly proper in making the deduction proposed, but that it appears to be your duty to do so in accordance with said specifications, which are a part of the contract between the City and said Contractor.

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